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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ALFONSO MORALES and
DAVID KOLATSKI,
Petitioners,

v.

ARTHUR JONES, MONICA RAY
and CITY OF MILWAUKEE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the speech of Morales and/or Kolatski was made pursuant to the official duties of their public employment as police officers with the Milwaukee Police Department's Vice Control Division?

PARTIES TO PROCEEDING

The petitioners are Alfonso Morales and David Kolatski.

The respondents are Arthur L. Jones, Monica Ray and City of Milwaukee.

RULE 29.6 STATEMENT

Alfonso Morales and David Kolatski are the full names of the petitioners. Morales and Kolatski are individuals and not a corporation, as was identified in the disclosure statement filed with the Seventh Circuit Court of Appeals on September 14, 2006 in Appellate Court No. 06-1463.

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The Opinion of the United States Court of Appeals for the Seventh Circuit dated July 17, 2007 is published at Morales v. Jones, 494 F.3d 590 (7th Cir. 2007). (App. 1-36). The United States Court of Appeals for the Seventh Circuit also issued orders denying the petitioners' and respondents' respective petitions for rehearing and rehearing en banc on August 17, 2007 which were unpublished orders. (App. 101-102). Judge David R. Herndon issued an unpublished decision on February 1, 2006 denying the defendants' motion after verdict. (App. 37-63). In addition, Judge J.P. Stadtmueller issued unpublished decisions on March 29, 2004 denying respondents' motion for summary judgment (App. 64-91), and on September 7, 2001 denying respondents' motion to dismiss. (App. 92-100).

STATEMENT ON THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on July 17, 2007. (App. 1-36). On August 17, 2007, the United States Court of Appeals for the Seventh Circuit denied the petitioners' and respondents' respective petitions for rehearing and rehearing en banc. (App. 101-102). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. CONST. amend. I.

Every person who, under color or any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act or Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The Petitioners, Alfonso Morales ("Morales") and David Kolatski ("Kolatski") were members of the Milwaukee Police Department's Vice Control Division ("VCD").

The primary mission of VCD is to arrest people involved in drug transactions or drug possession. (R.143:453; R.146:920). Police officers are assigned to VCD based on their ability to work in an undercover capacity to make drug buys. (R.143:347, 453; R.146:919-20).

VCD is an extremely desirable assignment for police officers who desire a career in investigations. (R.143:455). The advantage of being assigned as a police officer in VCD over a uniform police officer assignment included: working in plain clothes, having discretion to pursue investigations as opposed to responding from dispatcher assignment to dispatcher assignment, having a chance to get involved in investigations, and having the ability to start an investigation and to work through the investigation to its finish. (R.145:703-706). All of these opportunities help officers develop investigative skills that uniform officers do not get. (Id.)

When Kolatski was assigned to VCD as a police officer, he viewed it as a step up in his career. (R.146:947). Morales viewed his assignment to VCD as a coveted position, as a

stepping stone to learn investigative skills to move up the ranks. (R.143:499).

While assigned to VCD as a police officer, Morales mirrored a detective in drug investigations from start to finish and was involved in drug surveillance, the recovery of evidence, the execution of search warrants, and processing his cases through the District Attorney's Office to a guilty plea or jury trial. (R.143:499-500).

On March 22, 1998, Lt. Edward Liebrecht ("Liebrecht") received a phone call from a landlord complaining that one of his tenants, Vincent Ray, was altering his property to secure it for selling drugs. (App. 2). The landlord informed Liebrecht that he knew Vincent Ray was Deputy Chief Monica Ray's brother based on his rental application. (Id.) Liebrecht spoke to Chief Jones about the complaint because the Chief wanted to be made aware of all matters that would come to the attention of the media, and the Deputy Chief's brother selling drugs was such a matter. (App. 2; R.142:282). Chief Jones told Liebrecht to investigate the matter immediately. (App. 2). Liebrecht then notified Deputy Chief Ray of this complaint. (Id.) Deputy Chief Ray confirmed Vincent Ray was her brother, and that he was a heroine addict. (Id.; R.141:136-37; R.146:868). In addition, Deputy Chief Ray told Liebrecht that her brother may be wanted on warrants. (App. 2).

Liebrecht assigned the Vincent Ray case to Detective Joseph Link ("Link") and Morales, and informed Deputy Chief Ray that Link and Morales were assigned to the Vincent Ray investigation. (Id.; R.141:140; R.146:869). Morales ran a wanted check and learned Vincent Ray was wanted on two felony warrants. (App. 2-3). Liebrecht then instructed Morales and Link to meet with the complaining landlord. (R.143:505).

Morales and Link met with the landlord. (App. 3). The landlord explained that he told Vincent Ray to vacate the premises and showed Morales and Link how the property was altered. (Id.) Morales and Link then drove to the addresses provided to the landlord on his rental application in an attempt to locate Ray. (Id.)

At about 3 p.m. to 4 p.m., a shift change occurred causing Liebrecht to be relieved by Lt. James Shepard. (App. 3). Before Liebrecht left for the day, he called Chief Jones to update him on the Vincent Ray investigation. (Id.) By this time, Link and Morales drove by the addresses provided in Vincent Ray's application, but could not locate Ray or his vehicle. (R.145:711-12). As such, Link and Morales resumed their normal business activity. (R.145:712).

Then at about 4 p.m., the landlord called Morales and Link to inform them that he received a phone call from Vincent Ray. (App. 3). The landlord also told them he was meeting Vincent Ray at 5 p.m. on March 23, 1998. (Id.) In addition,

the landlord provided Link and Morales with a phone number from which Vincent Ray called. (Id.) Link and Morales planned to arrest Vincent Ray at this meeting. (Id.)

Lt. Shepard instructed Link to write a report detailing their investigation. (Id.) Link completed this report detailing every allegation made by the landlord, all names, addresses and phone numbers provided by Vincent Ray, all of their efforts to locate Ray, Ray's wanted status, and their plans to arrest Ray on March 23, 1998 at 5 p.m. (Id.) This report was then forwarded to the Night Deputy Inspector who by department policy was to provide the report to the Assistant Chief who was to provide the report to Chief Jones the next morning. (R.125:Ex.17; R.142:278-81; R.144:648-50, 653).

On March 23, 1998, Morales and Link attempted to arrest Vincent Ray at the scheduled meeting, but Vincent Ray did not appear. (App. 3). After March 23, 1998, Vincent Ray contacted the landlord two more times for the return of his security deposit, and on each occasion Morales notified Lt. Shepard of these planned meetings, but Vincent Ray failed to show. (App. 3-4).

Then on April 6, 1998, Morales received another call from the landlord and was told Vincent Ray was working on his vehicle around the 3000 block of West Burleigh Street. (Id., at 4). Morales then informed Link, but learned Link was leaving to execute a search warrant in a different

investigation. (Id.) Morales decided not to inform Lt. Shepard of this tip because the three previous meetings had fallen through after notifying Shepard. (App. 4; R.143:512). Instead, Morales asked Kolatski if he wanted to get into trouble. (R.143:512; R.146:948-49). More specifically, Morales asked Kolatski if he would help arrest Vincent Ray. (R.143:512).

At that point, Kolatski knew Morales and Link were given the assignment to arrest Vincent Ray, that Vincent Ray was the Deputy Chief's brother, had two outstanding felony warrants, and that Morales and Link were frustrated in trying to arrest Ray, as over the last two weeks Ray made appointments he failed to keep. (R.146:949). In addition, Kolatski knew Morales and Link informed Shepard of these meetings prior to the meeting times. (R.146:950). Yet, Kolatski who was not required to help, decided to help Morales arrest Ray. (R.143:514; R.146:951).

Morales and Kolatski arrested Vincent Ray on two felony warrants. (App. 4). When Vincent Ray was arrested, a knife was found in his car, together with marijuana and three rocks of cocaine. (R.143:514-15; R.125:Ex.6, at p. 1-2). Vincent Ray was immediately conveyed to the Police Administration Building ("PAB") while Morales and Kolatski made arrangements to meet with Link at the site of the search warrant Link was helping execute because it was Link's responsibility to question Ray on the possible drug operation, cocaine, marijuana and knife found in

Ray's car. (R.143:515; R.145:718-19). Morales and Kolatski then picked Link up and on the way back to the PAB, stopped at Gold Rush Chicken to get dinner. (R.143:515-16; R.145:719; R.146:955-56).

After ordering dinner at the counter, Morales went to the restroom. (App. 4). Kolatski and Link remained at the counter where Kolatski without using Vincent Ray's name informed Link of the details of Ray's arrest. (Id.). Kolatski told Link it was nice working with him because "he had a bad feeling about the situation." (App. 4; R.146:957). At that time, the owner of Gold Rush Chicken, John Mullarkey ("Mullarkey"), who was friends of Deputy Chief Ray, asked Kolatski, "what did you do, throw the Chief in jail?" (Id.) Kolatski responded, "No." (Id.) Mullarkey then asked if he had thrown Deputy Chief Ray in jail. (Id.) Kolatski again said no, and explained they arrested a relative of a higher ranking department member. (Id.) Mullarkey then said two weeks earlier he made a food delivery to Deputy Chief Ray's house, and Chief Jones was there when a man came out of the back room. (Id., at 4-5). Mullarkey explained this would have caused him concern about being robbed had he not been in the presence of two police officers. (Id., at 5).

Link then asked Mullarkey to describe the man. (Id.) Mullarkey identified him as a dark complected African American male with tattoos on his upper body, and added that Deputy Chief Ray introduced him as her brother. (Id.)

Morales returned from the restroom and they all left for the PAB. (Id.) On the way to the PAB, Kolatski told Morales about Mullarkey's story. (Id.) Link, Morales and Kolatski agreed the allegations were serious because if true, Deputy Chief Ray and Chief Jones had harbored a felon. (Id.)

At this time, Kolatski was worried, wasn't sure what to do and wanted somebody's opinion on what needed to be done. (R.146:960-61). Morales had the same concerns, but did nothing because the allegations were not the focus of their investigation which was the arrest of Vincent Ray. (R.143:518-19). As such, Morales did not feel any obligation to pass the Mullarkey information to anyone. (R.143:519).

From the squad, Detective Link notified Lt. Habeck, the on-duty supervisor at VCD that Vincent Ray was arrested. (R.146:916). Habeck then informed Deputy Chief Ray that her brother was arrested. (R.145:670). When Morales, Link and Kolatski arrived at the PAB VCD office, they learned Habeck told Deputy Chief Ray her brother was in custody. (R.146:961-62). Then they observed Habeck receive a call from Deputy Chief Ray. (R.146:962).

Habeck then wanted to know what address Vincent Ray gave, as that was the purpose of Deputy Chief Ray's phone call to him. (R.146:962). Link gave Habeck that address. (R.146:962). When Deputy Chief Ray learned that Vincent Ray

provided her address as his address, she instructed Habeck not to put that address on the arrest report as it was her address – not Vincent's. (R.141:151).

Habeck then relayed the Deputy Chief's instruction to Link to not list the Deputy Chief's name or address on the arrest report or pedigree report. (App. 5). Habeck then emphasized the Deputy Chief didn't care what address was used for Vincent, as they could use a "fucking" light pole so long as it was not her address. (R.145:723). Link refused to falsify any report. (App. 6). Both Morales and Kolatski observed Lt. Habeck and Link's conversation on the listing of Vincent Ray's address. (R.143:520; R.146:962-63). Link completed the arrest report by including Deputy Chief Ray's name and listing her address as Milwaukee. (App. 6).

Before leaving work on April 6, 1998, Morales reviewed the Vincent Ray arrest reports, made copies of them, and filed them with his supervisor. (Id.) Morales then left the arrest reports on his desk, and went home shortly after midnight. (Id.; R.143:530-31).

The next morning Morales returned to take the reports to the District Attorney's Office ("D.A."), and discovered that the first page of the pedigree report listing Deputy Chief Ray's name was missing. (App. 6). Morales searched VCD for the missing report, did not locate it, and decided to proceed to the D.A.'s office anyway. (Id.)

Morales met with Assistant D.A. John Chisholm ("Chisholm") and provided him with a synopsis of Vincent Ray's arrest and the possible charges. (Id.) Morales then provided Chisholm with the arrest reports. (Id.) Chisholm asked Morales why the first page of the pedigree report was missing. (Id.) Morales said to the best of his knowledge that particular page had been ordered not to include any information related to Deputy Chief Ray, and that he had pages two and three of the report, but did not know where page one was located. (Id.)

Chisholm then asked Morales what was going on. (R.145:797). Morales had concerns about answering Chisholm's question as he felt the answer would not benefit his career. (R.144:550-51). Further, Morales knew there was a MPD rule to report potential crimes, but knew he could ignore reporting this information because if he ignored the situation, no one would have known about it. (R.144:549-51). Additionally, Morales thought he could simply tell Chisholm he misplaced the report, and then get Vincent Ray to sign another report without violating any MPD rule. (R.144:641, 644). Yet, Morales decided to convey his concerns to Chisholm about what transpired on the Vincent Ray case from beginning to end as things were adding up, and because as a police officer, he could not act on the information as the allegations were against the Chief of Police and Deputy Chief who was the third highest ranking person in the MPD. (R.144:546-47).

Further, Morales knew that Chisholm as a prosecutor would know how to handle the situation as it concerned potential misconduct. (R.144:547). In this regard, the D.A.'s Office had investigators and arrest authority. (R.143:365).

Morales explained to Chisholm that he and Link were instructed by Liebrecht to investigate Vincent Ray, that everyone up the chain of command including the Chief knew Vincent Ray was wanted on felony warrants, they were instructed by the Chief to make Vincent Ray a priority arrest and to notify Lt. Shepard of any turn in events, they notified Lt. Shepard on three separate occasions of arranged meetings to arrest Vincent Ray, and all three meetings fell through. (App. 6-7; R.144:546). Morales then stated these events just raised suspicions. (R.144:546-47). Then Kolatski and Link got information from Mullarkey that he observed Chief Jones and Deputy Chief Ray with Vincent Ray at Deputy Chief Ray's home within the previous two weeks, and then considering that Habeck was instructed by Deputy Chief Ray to leave her information out of the arrest reports taken together with Link's response to those instructions, and the fact that portion of the report with Deputy Chief Ray's information was now missing was more than suspicious and should be looked into. (App. 7; R.144:547; R.145:797-98). Morales further added that Link and Kolatski had suspicions as did he as to what was going on. (App. 7; R.144:548). However, it was now Morales' belief that some misconduct occurred as he felt someone knew where Vincent Ray was,

and had informed Vincent Ray to avoid meeting with the landlord to receive his security deposit back. (App. 7; R.144:548-49).

Chisholm took this information up his chain of command to Deputy District Attorney Jon Reddin. (App. 7; R.145:799-800). Morales was then informed to come back on April 8, 1998 with Link, and but for Link, to avoid talking to anyone about this matter. (R.144:550-51). Chisholm and Investigator Budde were then ordered by Deputy District Attorney Reddin to interview Mullarkey. (App. 7). Chisholm and Budde learned from Mullarkey that he told Kolatski about his delivery to Deputy Chief Ray's house, but he was now certain the delivery occurred in January 1998. (Id.) Mullarkey stated he did not want to get Monica Ray in trouble or betray her friendship. (R.145:856; R.125:Ex.13, Ex. 14). However, Mullarkey offered that one of his delivery persons made a delivery to Deputy Chief Ray's home within the past two weeks, and provided that person's name. (App. 7).

On April 8, 1998, Link and Morales met with Chisholm and Reddin. (Id.) Link confirmed the instructions he was given by Habeck to omit Deputy Chief Ray's name and address from the pedigree report. (Id.) In addition, Link confirmed he refused to do so. (Id.) Link further confirmed the information Mullarkey had given. (Id.)

At the end of this meeting, Link informed Deputy D.A. Reddin that he wanted a secrecy

order as he was duty bound to inform his supervisor that an outside agency was investigating a MPD member. (R.143:553-54; R.145:731). However, Reddin would not swear them to secrecy. (R.143:553-54; R.145:731-32).

Upon returning to the MPD, Link and Morales reported the D.A.'s investigation to Lt. Liebrecht. (App. 7). From there, Liebrecht and Link went to VCD Captain Sucik to explain that the D.A.'s Office was conducting an investigation into Deputy Chief Ray and Chief Jones on implications they were present with a wanted felon. (App. 7; R.145:732-33).

Captain Sucik called Deputy Chief Ray to request a meeting. (R.143:462). When Deputy Chief Ray received this call, she was meeting with the MPD's public information person who told her they were getting calls from the media that the Deputy Chief's brother was arrested, and that the D.A. was investigating her for harboring him. (R.141:153). Nonetheless, Deputy Chief Ray, Captain Sucik, Link and the public information director met in Deputy Chief Ray's office. (R.141:154).

This meeting started out with Captain Sucik informing Deputy Chief Ray of what he knew, and then Deputy Chief Ray asking Link for further explanation. (R.145:734). Link explained what he knew. (R.145:734; R.125:Ex.8).

Deputy Chief Ray then called Morales to her office for further explanation. (R.141:153-54). Morales informed Deputy Chief Ray that the D.A. may be conducting an investigation into her and Chief Jones because of information Kolatski and Link received from Mullarkey in which Mullarkey described seeing Vincent Ray and Chief Jones together at her residence within the last two weeks. (R.143:462; R.144:554; R.145:735-36). In addition, Morales explained that the D.A. was told their investigation into Vincent Ray was going on for about three weeks, and there was a concern about the Chief and Deputy Chief's knowledge as to Vincent Ray's wanted status. (R.141:156-58; R.144:554-55). At that point, Deputy Chief Ray expressed concern about the D.A.'s investigation. (R.143:492). The Deputy Chief then explained that she did not understand why the D.A. was conducting this investigation, she wasn't aware that her brother was wanted on warrants, the D.A.'s investigation was racist and she was contacting her attorney. (R.141:160-67; R.144:555).

Deputy Chief Ray then called Chief Jones and informed him of what she learned. (R.141:160-61). In doing so, the Deputy Chief told Chief Jones the D.A. asked the officers not to say anything to them as they wanted to investigate Mullarkey's allegations. (R.141:161).

Deputy Chief Ray contacted her attorney and explained everything she learned about the D.A.'s investigation. (R.141:166). In doing so, she explained the investigation was racist because if

this had been a white chief and a black delivery man she doubted the investigation would have risen to the level it was at. (R.141:166-67). The Deputy Chief's attorney then went to meet with Mullarkey who the attorney knew. (R.141:168). It was after this meeting that Deputy Chief Ray and her attorney met. (R.142:265).

During that same day, Chisholm and Investigator Budde went back to Mullarkey's restaurant and discovered that Mullarkey had made food deliveries on March 19 and 23, 1998, though he previously denied making any food deliveries since January 1998. (App. 7). In addition, Investigator Budde located a receipt for a food delivery conducted by one of Mullarkey's delivery drivers to the Deputy Chief's mother's residence on March 28, 1998 and interviewed that driver who denied seeing a male at the Deputy Chief's residence. (Id.) Additionally, it was discovered that the April food delivery receipts were off premises at Mullarkey's home. (Id.)

After receiving Deputy Chief Ray's call, Chief Jones called D.A. E. Michael McCann and learned there was no investigation, but his office felt they had to at least look into Mullarkey's complaint. (R.141:170-71). Chief Jones learned that several deputy district attorneys were coming over to meet with him and Deputy Chief Ray to discuss this matter. (R.141:171).

Chief Jones met with Deputy Inspector Schunk who was in charge of the MPD's Internal

Affairs Division to discuss an internal investigation to find out if confidential information had been disclosed to Mullarkey by MPD officers as it was his understanding the VCD had been conducting a narcotics investigation into Vincent Ray. (R.125:Ex. 11; R.142:296-97; R.143:355, 420, 422). Chief Jones concluded this because if Vincent Ray had just been arrested for warrants, the Warrant Squad could have made that arrest. (R.142:296). Moreover, Jones made this conclusion because he understood Vincent Ray was involved in illegal acts involving narcotics and there was evidence he had fortified his residence as a drug house. (R.143:355). As a result, Chief Jones wanted to find out if anything from the narcotics investigation into Vincent Ray was discussed with Mullarkey. (R.142:296-97; R.143:355).

Chief Jones told Schunk he learned the D.A.'s office was investigating Deputy Chief Ray for harboring a felon, her brother. (R.143:423; R.125:Ex.11). Chief Jones then told Schunk he learned a couple of weeks earlier there were allegations the Deputy Chief's brother was dealing drugs. (Id.) Chief Jones then said that Vincent Ray was arrested, and the involved officers in this investigation were at a chicken restaurant on 27th and North talking when the owner stated he delivered chicken to the Ray residence when a man with tattoos answered the door and Chief Jones was standing behind him. (Id.) Chief Jones then told Schunk he had been to the Ray home, but doesn't recall a man with tattoos, nor being there when chicken was delivered. (Id.) Schunk

then learned from Chief Jones that two deputy district attorneys were coming over to the Chief's office to investigate, that Deputy Chief Ray had an attorney, and that Chief Jones wanted those police officers investigated for discussing police business at the restaurant. (Id.) Chief Jones may have provided the officers' names at that time, but Schunk did not make note of it. (R.143:424).

When the two deputy district attorneys arrived at Chief Jones' office, Chief Jones, Deputy Chief Ray and her attorney met with them. (R.141:169, 171-72). It was at this meeting the Chief and Deputy Chief believed Mullarkey's story had fallen apart, and the investigation was completed. (R.141:172).

However, on April 14, 1998, Deputy Chief Ray was visited by a reporter asking why Vincent Ray was shown a picture of Chief Jones by the district attorney. (R.141:172-73). Deputy Chief Ray then called Chief Jones to inform him a reporter was asking her why the District Attorney's Office was showing the Chief's picture to Vincent Ray. (R.141:173).

Chief Jones was concerned when he learned the D.A. was showing a convicted felon his photo. (R.142:303). Chief Jones considered this development as against the D.A.'s assurance there was no investigation and thought about the audacity of the D.A. to further some investigation by showing his picture to a felon. (R.142:304).

Chief Jones called Deputy D.A. Reddín at Reddin's home. (R.143:403; R.125:Ex.3). Reddin immediately recognized from the Chief's tone of voice that he was angry. (R.143:403; R.125:Ex. 3). Chief Jones asked Reddin why he would question Vincent Ray about the Chief's relationship with Deputy Chief Ray. (R.143:404; R.125:Ex.3). Reddin responded that he asked Vincent Ray questions about the allegation Chief Jones and Deputy Chief Ray were with Vincent at a time he was wanted. (Id.) Reddin explained if these allegations were true, and the Chief knew Vincent was wanted, that would have been a felony. (Id.) In addition, Reddin explained these allegations warranted an investigation because if they were true, the Chief of Police would be guilty of a felony. (R.143:404-05, 407-08).

Prior to this call on April 14, 1998, Chief Jones requested that Deputy Inspector Schunk contact Mullarkey to question him about what the officers had said, who brought the topic of Vincent Ray and Deputy Chief Ray up, how Mullarkey became involved in the conversation, and to find out how loud the officers were speaking for Mullarkey to overhear their conversation. (R.143:425). Then on April 17, 1998, Schunk interviewed Mullarkey who provided him with the description of the three officers detailing them as: a white male wearing a jacket with the word "Narcotics" on the back of it; another white male with a beard/goatee wearing a coverall with an MPD patch on the left shoulder; and a Hispanic male wearing a blue nylon jacket. (R.143:427, 443-

44). Following this interview, Schunk briefed Chief Jones on Mullarkey's information. (R.143:427, 429, 444). At that time, Schunk had a good idea who the involved officers were that relayed the Mullarkey allegations to the District Attorney. (R.143:429, 449).

On that same day, Kolatski was transferred from VCD to District No. 1 nightshift patrol duty. (App. 8). No one in the department explained why Kolatski was transferred and confirmed he was performing well at the time. (Id.)

On May 15, 1998, Chief Jones informed Deputy Inspector Schunk to suspend the internal investigation with a finding of no wrongdoing for any officer involved in the Mullarkey situation. (R.143:430, 450). Chief Jones made this determination because there was no additional investigation on the part of the officers into Vincent Ray's drug dealing. (R.143:362-64). As such, Chief Jones felt that once Vincent Ray was arrested on warrants, any conversation with Mullarkey would not have jeopardized any ongoing VCD investigation as there was no additional investigation into Vincent's drug dealing. (Id.)

Then in the fall of 1998, Kolatski gave a deposition in the case Kuchenreuther v. Jones. (R.142:183). Following this deposition, the City Attorney called Deputy Chief Ray and wanted to know why Kolatski was transferred, as Kolatski had alluded he was transferred out of VCD. (R.142:184).

On December 8, 1998, Link and Morales were deposed in Kuchenreuther v. Jones, a case in which Chief Jones was accused of transferring a police officer in violation of the officer's First Amendment rights. (App. 8). During Morales' deposition, he testified about the Mullarkey information and opined that Kolatski was transferred as a result of events connected with the Vincent Ray arrest and the Mullarkey information. (Id.)

Within days of the December 8, 1998 depositions, Chief Jones reassigned Link to the VCD's prostitution section and was not reassigned to the VCD narcotics section until about a week in advance of Morales' transfer to nightshift patrol duty. (Id.; R.145:702, 743-44). Link testified at his deposition that the least favorable assignment he ever had in the MPD was the VCD's prostitution section. (R.145:700).

Morales' transfer to District No. 6 nightshift patrol duty occurred on January 22, 1999. (R.125:Ex.5). No one in the department could explain why Morales was transferred as he was an excellent officer performing at a high level. (R.143:472-473; R.144:656; R.145:679-80; R.146:890-91).

Chief Jones admitted the City Attorney kept him appraised of the status of the Kuchenreuther case as he was a party defendant in that case. (R.143:388-89).

On May 20, 2000, Morales and Kolatski filed a Complaint in the Eastern District of Wisconsin under 42 U.S.C. § 1983, alleging that Chief Jones and Deputy Chief Ray violated their First Amendment rights by transferring them to patrol duties. (App. 8). The defendants filed a motion for judgment on the pleadings which was denied. (Id.) At the close of discovery, defendants filed a motion for summary judgment which was denied. (Id.) A four-day jury trial occurred and on November 19, 2005, a jury returned a verdict in favor of the plaintiffs awarding each plaintiff $20,000 in compensatory damages and $65,000 in punitive damages. (Id.)

On December 6, 2005, defendants filed motions for judgment as a matter of law. (Id.) On February 1, 2006, the district court denied those motions and granted the plaintiffs' motion for attorney fees and costs. (Id.) The defendants then appealed, and on July 17, 2007, the United States Court of Appeals for the Seventh Circuit reversed the district court's ruling denying the defendants' motion for judgment as a matter of law with regard to Kolatski, and remanding for a new trial on Morales' claim. Morales v. Jones, 494 F.3d 590 (7th Cir. 2007). Morales and Kolatski as well as defendants filed Petitions for Rehearing and Rehearing En Banc which were denied by the Seventh Circuit on August 17, 2007. Morales and Kolatski now bring this Petition for a Writ of Certiorari.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

I. The lower courts need this Court to articulate a more comprehensive framework for defining the scope of an employee's duties for First Amendment protection.

This Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti v. Ceballos, --- U.S. ---, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689 (2006). However, this Court has also made it clear that, "public employees do not surrender all of their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Morales v. Jones, 494 F.3d 590, 595 (7th Cir. 2007), See e.g., Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

As such, this Court emphasized in Garcetti that if the public employee's expression was made "pursuant to" their "official duties," the employee

was not speaking as a citizen for First Amendment purposes. Morales, 494 F.3d at 596. In making this ruling, this Court stated, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Id., *citing* Garcetti, 126 S.Ct. at 1960.

In reaching this holding, this Court provided general guidance as to what speech might qualify as being made "pursuant to" a public employee's "official duties." Morales, 494 F.3d at 596, *citing* Garcetti, 126 S.Ct. at 1962. The court's general guidance stated that, "the inquiry is a practical one and should focus on the duties an employee is actually expected to perform.'" Id. Further, this Court specifically rejected the notion that job descriptions were a determining factor. Morales, 494 F.3d at 601, *citing* Garcetti, 126 S.Ct. at 1962. As such, this Court specifically stated that, "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." Id.

However, this Court "had no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." Morales, 494 F.3d at 596, 601; *citing* Garcetti, 126 S.Ct. at 1961.

This case is just such a case. Morales, 494 F.3d at 596, 601.

The speech at issue in this petition involves Officer Morales' discussions with the District Attorney's Office "("D.A.") in which he explained his suspicions of Police Chief Arthur Jones and Deputy Chief Monica Ray's acts of harboring the Deputy Chief's brother, Vincent Ray, who was known to be wanted on felony warrants and who was under investigation by the Milwaukee Police Department's ("MPD") Vice Control Division ("VCD") for selling and being in possession of illegal narcotics. Morales, 494 F.3d at 599.[1] In addition, this petition involves the speech of Officer Kolatski in conversing with Mullarkey and Detective Link at Gold Rush Chicken in which Mullarkey provided Kolatski with information that he delivered food to the Deputy Chief's home during the time period of the VCD investigation of Vincent Ray, and observed the Chief and Deputy Chief with Vincent Ray, and Kolatski's subsequent conversations with Morales about these allegations. Morales, 494 F.3d at 599.

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[1] Also at issue before the Seventh Circuit was Officer Morales' speech during a deposition he gave on December 8, 1998 under subpoena in an unrelated civil case involving an allegation by another MPD officer that the Chief retaliated against her in violation of First Amendment speech rights. In this deposition, Morales testified about the Mullarkey allegations, his conversation with the D.A., and his opinions that Kolatski was transferred in retaliation for reporting their suspicions to the D.A. Morales, 494 F.3d at 598, 603-05. However, this petition does not raise any issues regarding that speech as the Seventh Circuit declared that speech to be outside of Officer Morales' official duty, and therefore, was protected speech. Id.

The Seventh Circuit found that Morales' conversation with the D.A. was made pursuant to his official duties because the speech occurred when Morales was reviewing the Vincent Ray arrest report as part of his official duty to assist the D.A. in prosecuting Vincent Ray, and because the MPD had a rule for its officers to report all potential crimes. Morales, 494 F.3d at 597-98. As for Kolatski, the Seventh Circuit determined that his speech was pursuant to his official duties, as he was recruited by Morales to assist in the arrest of Vincent Ray, and the information provided by Kolatski to Morales was nothing more than providing information pertinent to the Vincent Ray case. Id., at 597, 599. However, in reaching this decision, Justice Rovner noted:

> The Supreme Court remarked that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." Garcetti, 126 S.Ct. at 1962. Detective Kolatski was performing his job admirably at the time of these events, and although his demotion for truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti* it does not offend the First Amendment. In *Garcetti*, after all, the Court wished to avoid a rule that would mandate "judicial oversight of communications between and among government employees and their

> superiors in the course of official business." 126 S.Ct. at 1961.
>
> Id., at 599.

For the reasons set forth as follows, the Garcetti holding does not make the speech at issue as being made pursuant to official duties. This Court's further articulation of framework defining the scope of an employee's duties is needed because it is this Court and not the Seventh Circuit that should be deciding that framework. In addition, this is not a mere employee grievance involving employees being punished by the employer for doing an act created or commissioned by the employer. Rather, this is a case involving employees disclosing the potential acts of criminal misconduct of their department heads to an independent agency for an independent investigation of the alleged acts of misconduct. Moreover, this Court's review of this case is needed because the Seventh Circuit's decision may all but shut the door on First Amendment protection for public employees who speak about the potential misconduct of high ranking public officials within their agency when that information is learned by the public employee while performing their official duties even though those official duties have no connection with the reporting of the potential misconduct to the appropriate authorities.

A. Why Moralas' speech is protected by Garcetti.

Morales' discussion regarding his suspicions of the Chief and Deputy Chief's potential acts of misconduct occurred when he was delivering the Vincent Ray arrest reports to the D.A. Morales, 494 F.3d at 600. Morales was obliged by his official duty to deliver these reports to the D.A. as it was his official duty to assist and help the D.A. in the prosecution of Vincent Ray for felony warrants and involvement in the selling and possession of illegal narcotics. Id. In addition, Morales' suspicions about the Chief and Deputy Chief's potential acts of misconduct came in response to the D.A.'s questions of Morales about the missing page of the pedigree report for Vincent Ray. Id.

The Majority considered these facts and found that Morales was on duty, assisting the D.A. in a case he was assigned and complying with a MPD rule to report all potential crimes when this conversation occurred. Id., at 598. As such, the Majority found Morales was acting pursuant to his official duties. In contrast, Justice Rovner found that Morales was not obligated to report his suspicions about why the first page of the pedigree report that connected Deputy Chief Ray to Vincent Ray and provided their address was missing because that went beyond his work duties. Id. Justice Rovner's reasoning finds support in Garcetti and requires this Court's declaration of such.

First, any determination that the MPD's rules to report all potential crime converts Morales' decision to report his suspicions of the Chief and Deputy Chief's potential misconduct to the D.A. is not supported by Garcetti. This is because this Court generally stated that job descriptions were not a determining factor nor was the listing of a task a determining factor in deciding if the speech was made pursuant to an official duty. Garcetti, 126 S.Ct. at 1962. Rather, "the inquiry is a practical one" focusing on "the duties an employee actually is expected to perform." Id. The record supports that despite the MPD rule, Morales had considerable discretion in determining what he investigated or didn't investigate, and that he was not obligated in practice to report these allegations. Morales, 494 F.3d at 600. Yet, despite the fact this was not a duty the employee was expected to perform, the Majority held that when Morales chose to report his suspicions, he did so pursuant to his job duties. Id., at 598. In other words, a rule that by practice provides the officer discretion in reporting and/or investigating potential crime makes any use of that discretion an "official duty." Such a position was previously rejected by the Seventh Circuit in Delgado v. Jones, 282 F.3d 511, 519 (7th Cir. 2002). More specifically, it was found that to declare this rule as making an officer duty bound to report all potential crimes "[swept] much too broadly." Id. Rather, the considerable discretion the officer had to divulge this information, and the method chosen to divulge the information "went far beyond some rote, routine discharge of an

assigned duty." Id. However, since Garcetti, the Seventh Circuit has declared that the term, "official duty" is much broader than the Seventh Circuit's prior focus on "core" job functions that focused on rote, routine discharges of assigned duties because "official duties'" include expressions made pursuant to official responsibilities. Spiegla v. Hull, 481 F.3d 961, 966 (7th Cir. 2007). This change in precedent goes well beyond the dictates and contradicts Garcetti which focused on a practical inquiry looking at the duties an employee is expected to perform. Garcetti, 126 S.Ct. 1962. Such reasoning applied to the facts presented would require more than an general rule that is not followed in practice to make the reporting of all potential crime an "official duty."

In addition, Morales could not have been acting "pursuant to" his "official duty" when he reported his suspicions to the D.A. even though he was at the D.A.'s office as part of his official duty when the declaration was made. This is because Morales could not act on these allegations, as he was a police officer and the allegations were made against the highest and third highest ranking individuals in the MPD. Morales, 494 F.3d at 600. A fact the Chief also verified. Id., at 601. As such, the fact Morales' speech occurred while on duty and was based on information he learned while on duty does not mean the speech was commissioned or created by the employer. Id., at 602.

This Court affirmed in Garcetti that,

> [T]he fact that his speech concerned the subject matter of his employment is not dispositive, though, because in Garcetti, the Court reaffirmed the principle that the First Amendment protects some speech related to the speaker's job, at least in part because front line workers like . . . police officers . . . are, as a class, most likely to have informed and definite opinions about matters of public concern related to their jobs.

Morales, 494 F.3d at 602, *citing* Garcetti, 126 S.Ct., at 1959, *citing* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), and Pickering, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

However, this Court also noted that "[o]fficial communications have official consequences," and that "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." Morales, 494 F.3d at 601, *citing* Garcetti, 126 S.Ct. 1960. Therefore, it must be determined whether the speech owed its existence to the employee's professional responsibilities because the employer commissioned or created it as opposed to whether the speech was the kind of activity engaged in by persons who do not work for government. Morales, 494 F.3d at 602.

In using this analysis, Justice Rovner noted Morales' speech to the D.A. is a "close case" under Garcetti because even though this speech occurred on duty, and was in response to questions about a report he was obligated to present, the work he was paid to perform was the prosecution of Vincent Ray, not to act as a witness in disclosing information about potential public corruption. Id.

As such, even though Morales started his conversation with the D.A. within his job duties, he went beyond his obligations as a police officer when he decided to disclose his suspicions about the Chief and Deputy Chief because in doing so, he acted as a witness to public corruption in the same fashion any citizen who witnessed suspicious conduct by a government official might speak. Id. In this regard, both government employees and persons who do not work for government may report possible wrongdoing or crimes by government officials, and any citizen may report suspicions of public corruption to the D.A. just as Morales did. Id., at 602-03. As this Court stated in Garcetti, "when a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." Id., at 602-03, *citing* Garcetti, 126 S.Ct. at 1961. At least one other Circuit found likewise when it found that it was not part of a jail guard's official task to report sexual harassment to a senator and inspector general about a jail official's failure to respond to charges of sexual harassment because she was speaking as a citizen to expose official malfeasance

to broader scrutiny which went beyond her job duties to report sexual harassment in the jail to jail officials. Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006), *cert denied,* --- U.S. ---, 127 S.Ct. 1918, 167 L.Ed.2d 567 (2007). In this regard, the Ninth Circuit further stated that the "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee." Id. Yet, if this Court does not review this case to provide guidance by articulating a more comprehensive framework for defining the scope of an employee's duties for First Amendment protection, the Ninth Circuit's holding would guarantee an employee the right to complain to an independent agency about sexual harassment, but the Seventh Circuit's holding would deny public employees the right to provide information to an independent state agency about potential criminal activity of the employee's department heads. Such a conflict needs to be corrected by this Court.

B. Why Kolatski's speech is protected by Garcetti.

Kolatski's assigned duty at the time he had discussions with Mullarkey and later with Morales about Mullarkey's allegations was to assist in the arrest of Vincent Ray. His conversation with Mullarkey occurred because he was speaking with Detective Link about the details of Vincent Ray's arrest, but his conversation with Mullarkey had no relevance or contribution to the arrest of Vincent

Ray. Likewise, the relaying of the Mullarkey information to Morales had no relevance or contribution to Morales' assist to the D.A. in prosecuting Vincent Ray for felony warrants and Ray's involvement in selling/possession of illegal narcotics.

As a VCD officer, Kolatski could not investigate the Chief and/or Deputy Chief, but was paid to perform narcotic investigations. Morales, 494 F.3d at 600; (R.143:453; R.146:920). Simply put, Kolatski could not within the scope of his employment to act on the Mullarkey allegations. Morales, 494 F.3d at 600. As such, under Garcetti, Kolatski's speech was not "work product" as it was not speech that he was paid to perform, but was speech resulting from the kind of activity engaged in by persons who did not work for government, as both government employees and persons who do not work for the government may report possible wrongdoing or crimes by government officials. Id., at 601-02. Therefore, when Kolatski spoke to Mullarkey and learned of Mullarkey's allegations and then provided those allegations to Morales, he did so beyond his obligations as a police officer assigned to the VCD and acted as any citizen who had information regarding the suspicious conduct of a government official.

This conclusion fits squarely with this Court's dictates in Garcetti which stated that the First Amendment protects some speech made at work and related to the subject matter of the plaintiff's job. Garcetti, 126 S.Ct. at 1959. This is

just such a case in which Kolatski's speech occurred at work and arose from the subject matter of his work. Namely, his conversations would never have occurred but for his work in assisting Morales to arrest Vincent Ray. An assist that required Kolatski to provide the details of that arrest to Link. However, it was not Kolatski's duty to discover or investigate the potential criminal misconduct of the Chief and/or Deputy Chief. As an officer in the VCD, Kolatski was assigned to assist in and investigate cases involving the selling or possessing of illegal narcotics. A fact Morales made clear in his testimony when he said that when Kolatski informed him of Mullarkey's allegations, he was under no obligation to act on the Mullarkey information as the focus of his assigned duty was to arrest Vincent Ray. (R.143:518-19). Simply put, Kolatski was not being paid to listen to Mullarkey's allegations, and those allegations being relayed to Morales would not be "work product" that would qualify as an act done pursuant to official duties."

As such, much like the jailer in Freitag, Kolatski had the right to disclose this information to an officer who would report the information to the D.A. much like every public employee has the right to complain both to an elected public official and to an independent state agency regardless of their status as a public employee. Freitag, 468 F.3d at 545. This Court's decisions have sought both to promote the individual and societal interests that are served when employees speak as

citizens on matters of public concern and to respect the needs of government employees attempting to perform their public functions. Piggee v. Carl Sandburg College, 464 F.3d 667, 670 (7th Cir. 2006), *citing* Connick v. Myers, 461 U.S. 138, 154, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Kolatski's action to relay the Mullarkey allegations about the Chief and Deputy Chief's potential misconduct of harboring the Deputy Chief's brother who was a known felon easily falls on the side of promoting individual and societal interest as opposed to stifling the government employer with a constitutionalized employee grievance. Connick, 461 U.S. at 154. "Certainly, a communication by a law enforcement officer that contains information essential to a complete and objective investigation of serious criminal activity is 'content' that implicates public concern." Delgado, 282 F.3d at 517-18. This is especially so when it deals with the potential malfeasance of high ranking officials within a police department because the Seventh Circuit's ruling in Morales will hopelessly compromise the reporting of that potential malfeasance as the reporting public employee could be retaliated against for communicating factual details of that potential malfeasance to other independent state agencies for investigation. This holding could only help to insulate those high ranking government officials who act as kings or queens to create a self governing kingdom. This is directly against the dictates of this Court that has protected the employee and public in disclosing such potential malfeasance. Garcetti, 126 S.Ct. at 1959.

Kolatski and Morales' duties did not encompass the reporting of potential misconduct of the Chief and Deputy Chief to members within the MPD as they were employed by the MPD to investigate illegal narcotic cases and to help prosecute those cases, let alone reporting that to the D.A. who was a separate governmental agency that had no employment authority over them. The application of Garcetti prohibiting the reporting of these potential criminal acts outside of their job duties was not intended nor supported by this Court. As such, it is time for this Court to now define the scope of an employee's duties as the Seventh Circuit and other circuits need this clarification to decide close cases such as this case.

CONCLUSION

For all of the foregoing reasons, the petitioners, Alfonso Morales and David Kolatski, respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 06-1463

ALFONSO MORALES and
DAVID KOLATSKI,

Plaintiffs-Appellees,

v.

ARTHUR JONES, MONICA RAY,
and CITY OF MILWAUKEE,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 00-C-618 – **David R. Herndon**, *Judge.*

ARGUED JANUARY 11, 2007 – DECIDED JULY 17, 2007

Before BAUER, FLAUM, and ROVNER, *Circuit Judges.*

FLAUM, *Circuit Judge.* The Milwaukee Police Department employed David Kolatski and Alfonso Morales as police officers in its Vice Control Division ("VCD"). Kolatski and Morales were reassigned to street patrol duties after informing an Assistant District Attorney about allegations that Police Chief

Arthur Jones and Deputy Chief Monica Ray had harbored the Deputy Chief's brother, who was wanted on felony warrants. Kolatski and Morales brought suit under 42 U.S.C. § 1983, alleging that Jones and Ray violated their First Amendment rights. After a four-day trial, a jury returned a verdict for Morales and Kolatski, awarding them compensatory and punitive damages. Jones and Ray filed a motion for judgment as a matter of law, which the district court denied. Jones and Ray appeal from that denial. For the following reasons, we reverse the district court's judgment.

I. Background

On March 22, 1998, Lieutenant Edward Liebrecht received a phone call from a landlord complaining that one of his tenants, Vincent Ray, was altering his property to make it suitable for selling drugs. The landlord informed Liebrecht that he knew Vincent Ray was Deputy Chief Ray's brother because of his rental application. Liebrecht spoke about the complaint with Chief Jones, who told Liebrecht to investigate the matter immediately. Liebrecht subsequently notified Deputy Chief Ray of the call. She confirmed that Vincent Ray was her brother and that he was a heroin addict. She also told Liebrecht that her brother might be wanted on warrants.

Liebrecht assigned the case to Morales and Detective Joseph Link. Morales ran a warrants check on Vincent Ray and discovered that he was wanted on

two felony warrants. Link and Morales then met with Vincent Ray's landlord who showed them the altered property and informed them that he had asked Ray to vacate the premises. After speaking with Ray's landlord, the officers drove to each of the addresses Ray provided in his rental application in an attempt to locate him or his car.

Liebrecht's shift ended at 3 p.m. that day, and Lieutenant James Shepard relieved him. Before the end of his shift, Liebrecht called Chief Jones to update him on the investigation. At 4 p.m. the landlord informed Morales and Link that Vincent Ray had called him. The landlord also told the officers that he had set up a meeting with Ray to return his security deposit at 5 p.m. the following day, March 23. The landlord also provided the detectives with the phone number from which Ray called. The detectives planned on arresting Ray at this meeting.

Shepard instructed Link to write a report detailing the investigation. Link included the landlord's allegations, his and Morales' efforts to locate Ray, the names, addresses, and phone numbers from Ray's rental application, Ray's outstanding warrants, and the detectives' plans to arrest him on March 23 at 5 p.m.

On March 23, 1998, Link and Morales attempted to arrest Ray at the scheduled meeting with his landlord, but Ray did not show up. Ray set up two more meetings to get his security deposit, and both times the detectives informed Shepard that they

planned to arrest him. However, Ray failed to appear at those meetings as well.

On April 6, 1998, the landlord called Morales and told him that Ray was working on his car around the 3000 block of West Burleigh Street. Morales informed Link, but Link was executing a search warrant in another investigation. Morales decided not to inform Shepard about the tip because the three previous meetings had fallen through. Instead, he asked Kolatski to help him arrest Ray. Morales and Kolatski arrested Ray on two felony warrants. The detectives found a knife, marijuana, and three rocks of cocaine in Ray's car. The detectives took him to the police administration building and then made arrangements to meet Link.

Morales and Kolatski met Link at Gold Rush Chicken to pick up dinner. After ordering dinner at the counter, Morales went to the restroom. Kolatski and Link stayed at the counter discussing the details of Ray's arrest, although they did not use his name. Kolatski told Link that "he had a bad feeling about the situation." Gold Rush Chicken's owner, John Mullarkey, who was a friend of Deputy Chief Ray, overheard the conversation and asked Kolatski, "what did you do, throw the Chief in jail?" Kolatski said no. Mullarkey then asked whether they had thrown Deputy Chief Ray in jail. Kolatski again said no and explained that they had arrested the relative of a higher ranking department member. Mullarkey told the detectives that two weeks earlier he delivered food to Deputy Chief Ray's house and that Chief

Jones was there when a man came out of a back room. Mullarkey explained that had he not been in the presence of two police officers, he would have been worried that the man might rob him. Link and Kolatski asked Mullarkey to describe the individual. Mullarkey identified him as a black man with a dark complexion and a tattoo on his upper body. Mullarkey also said that Deputy Chief Ray introduced him as her brother.

Morales returned from the restroom. After leaving the restaurant, Kolatski told Morales about Mullarkey's story. The three detectives agreed that the allegations were serious because, if true, the Chief and Deputy Chief had harbored a felon.

After returning to the police administration building, Link told Lieutenant Habeck, the on-duty supervisor, that Vincent Ray had been arrested. Habeck informed Deputy Chief Ray that her brother was in custody. Link, Kolatski, and Morales listened to a phone call between Habeck and Deputy Chief Ray, in which the Deputy Chief asked what address Vincent Ray gave the officers when they arrested him. When Habeck said that Ray had provided Deputy Chief Ray's address, she instructed Habeck not to include that address on the arrest report. Habeck relayed the instruction not to list Deputy Chief Ray's name or address on Vincent's arrest or pedigree

reports to Link.[1] Link refused to falsify the reports and included Deputy Chief Ray's name but simply listed her address as "County of Milwaukee."

On the evening of April 6, 1998, Morales reviewed Vincent Ray's arrest reports, made copies of them, and filed them with his supervisor, leaving the reports on his desk for the evening. The next morning, Morales returned to take the reports to the District Attorney's ("D.A.") office, and discovered that the first page of the pedigree report, listing Deputy Chief Ray's name, was missing. Morales searched for the missing report, did not locate it, and decided to proceed to the D.A.'s office anyway.

Morales met with Assistant D.A. John Chisholm and provided him with a synopsis of Ray's arrest and the possible charges. Chisholm asked Morales why the first page of the pedigree report was missing. Morales said that to the best of his knowledge the page had been ordered not to include any information related to Deputy Chief Ray and that he had pages two and three of the report, but did not know where page one was located.

Chisholm inquired further, and Morales told him about the investigation and Ray's arrest. Morales also told Chisholm that he and Link had notified Shepard on three separate occasions of arranged meetings to

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[1] A pedigree report is a report that lists an arrestee's name, age, gender, physical description, race, family members, home address and phone number, among other information.

arrest Vincent Ray, but that all three meetings fell through. Morales then recounted Mullarkey's conversation with Kolatski and Link, as well as Deputy Chief Ray's instructions to leave her information out of the arrest reports. Morales told Chisholm that he believed that prior to Ray's arrest, someone had known Vincent Ray's location and informed Ray to avoid meeting with the landlord to receive his security deposit.

Chisholm met with Deputy District Attorney Jon Reddin and relayed Morales' information. Reddin instructed Chisholm to interview Mullarkey. Chisholm and another investigator spoke with Mullarkey who confirmed that he told Kolatski and Link about his delivery to Deputy Chief Ray, but was now certain that the delivery occurred in January 1998. Mullarkey stated that one of his employees made a delivery to Deputy Chief Ray's home within the past two weeks and provided the employee's name.

On April 8, 1998, Link and Morales met with Chisholm and Reddin. Chisholm and Reddin spoke to Link who confirmed that Habeck instructed him to omit Deputy Chief Ray's name and address from the pedigree report, but that he refused to do so. Link verified his discussion with Mullarkey as well.

Link and Morales reported the D.A.'s investigation to Liebrecht. Liebrecht informed a superior who met with Chief Jones, Deputy Chief Ray, and Link. Deputy Chief Ray then met with Morales to discuss the D.A.'s investigation.

During the same day, Chisholm went back to Mullarkey's restaurant and discovered that Mullarkey had made food deliveries on March 19 and 23, 1998, though he had previously denied making any food deliveries since January 1998. In addition, another investigator interviewed the driver who delivered food to Deputy Chief Ray's home on March 28th. The driver denied seeing a male at Deputy Chief Ray's residence. Additionally, Chisholm discovered that there were no food deliveries on March 29, and all of the April food delivery receipts were off premises at Mullarkey's home. As a result, the D.A.'s office concluded that Mullarkey's allegations against Chief Jones and Deputy Chief Ray were false.

On April 17, 1998, Chief Jones transferred Kolatski from VCD to District No. 1 night-shift patrol duty. No one in the police department explained why Kolatski was transferred, and he was performing well at the time. On December 8, Link and Morales gave depositions in *Kuchenreuther v. Jones,* a case in which Chief Jones was accused of transferring a police officer in violation of the officer's First Amendment rights. During Morales' deposition, he testified about the Mullarkey information and opined that Kolatski was transferred as a result of events connected with Vincent Ray's arrest. Within days of the December 8 depositions, Chief Jones reassigned Link to the VCD's prostitution section. Nearly two months later, on January 22, 1999, Chief Jones transferred Morales to District No. 6 night-shift patrol duty.

On May 20, 2000, Morales and Kolatski filed a complaint in the Eastern District of Wisconsin under 42 U.S.C. § 1983, alleging that Chief Jones and Deputy Chief Ray violated their First Amendment rights by transferring them to patrol duties. The defendants filed a motion for judgment on the pleadings, which the district court denied. After the close of discovery, the defendants filed a motion for summary judgment. The district court also denied that motion. On November 19, 2005, after a four-day trial, the jury returned a special verdict in the plaintiffs' favor. The jury awarded both plaintiffs $20,000 in compensatory damages and $65,000 in punitive damages, finding that the defendants' actions were wilful, wanton and malicious. On December 6, 2005, the defendants filed motions for judgment as a matter of law. On February 1, 2006, the district court denied those motions and granted the plaintiffs' motions for attorneys' fees and costs. The defendants now appeal.

II. Discussion

The defendants argue that the district court erred by not granting them judgment as a matter of law because Kolatski's and Morales' speech was not protected by the First Amendment. This Court reviews de novo the district court's denial of a motion for judgment as a matter of law. *LaFollette v. Savage*, 63 F.3d 540, 543-44 (7th Cir. 1995).

The defendants argue that their actions did not violate the plaintiffs' First Amendment rights because

the plaintiffs' speech was made pursuant to their official duties. The Supreme Court has made clear that public employees do not surrender all of their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *See, e.g., Rankin v. McPherson,* 483 U.S. 378 (1987); *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.,* 391 U.S. 563 (1968). The Supreme Court recently clarified, however, that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos,* ___ U.S. ___, 126 S.Ct. 1951, 1960 (2006).[2]

In *Garcetti,* the Court evaluated the First Amendment claims of a deputy district attorney (Ceballos). Believing that a search warrant affidavit contained misrepresentations, Ceballos wrote two memoranda recommending the dismissal of pending charges. *Id.* at 1955-56. He was later transferred from his calendar deputy position to a trial deputy position and assigned to work at another location. *Id.*

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[2] The district court ruled in this case on February 1, 2006. The Supreme Court decided *Garcetti* on May 30, 2006. As a result, the district court did not have the opportunity to consider *Garcetti* in its analysis.

at 1956. He sued under § 1983, alleging retaliation for his speech. Focusing on the "citizen" prong of the First Amendment analysis, the Court determined that Ceballos "wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do." *Id.* at 1960. Because his expression was "pursuant to" his official duties, he was not speaking as a citizen for First Amendment purposes. *Id.* The Court stated, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.*

In light of *Garcetti,* the crux of our inquiry is whether Morales' and Kolatski's speech was made pursuant to their official duties. Because both parties in *Garcetti* agreed that Ceballos' speech was made pursuant to his official duties, the Court "had no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 126 S.Ct. at 1961. Lower courts, including this one, have applied *Garcetti* in an attempt to define the scope of an employee's duties. *See Haynes v. City of Circleville, Ohio,* 474 F.3d 357 (6th Cir. 2007); *Mayer v. Monroe County Cmty. Sch. Corp.,* 474 F.3d 477 (7th Cir. 2007); *Green v. Bd. of County Comm'rs,* 05-6297, 2007 WL 4210 (10th Cir. Jan. 2, 2007); *Freitag v. Ayers,* 468 F.3d 528 (9th Cir. 2006); *Battle v. Bd. of Regents for the State of*

Ga., 468 F.3d 755 (11th Cir. 2006); *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006).

Those courts have followed the Supreme Court's general guidance that "the inquiry is a practical one" and should focus on "the duties an employee actually is expected to perform." *Id.* at 1962. For example, in *Battle*, the plaintiff was the financial aid counselor at Fort Valley State University. Her job required her to verify the completion and accuracy of student files as well as report any perceived fraudulent activity. 468 F.3d at 758. The plaintiff reviewed several student files, discovering that her supervisor had been falsifying information and awarding financial aid to ineligible recipients. The plaintiff spoke to the supervisor, the University president, and finally to the University's Vice-President of Student Affairs. Shortly after her final meeting, the University decided not to renew the plaintiff's contract. The Eleventh Circuit held that because the plaintiff's specific job responsibilities included ensuring the accuracy and completeness of student files and reporting any mismanagement or fraud, her speech was made pursuant to her official employment responsibilities. The court also noted that Department of Education Guidelines require all financial aid workers to report suspected fraud. *Id.* at 761.

Lower courts have also been careful to recognize that, under *Garcetti*, "public employees retain the prospect of constitutional protection for their contributions to the civic discourse." 126 S.Ct. at 1960. In *Freitag*, the plaintiff, a corrections officer, was

sexually harassed by several inmates at the Pelican Bay State Prison. She complained to her supervisors that her documentation of the incidents was denied or thrown away. After she complained to her state senator and the State Office of the Inspector General, the prison warden terminated her. The Ninth Circuit held that the plaintiff's "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee." 468 F.3d at 545. The court stated that "it was certainly not part of her official tasks to complain to the [s]enator or the IG about the state's failure to perform its duties properly. . . . Rather, it was [the plaintiff's] responsibility as a citizen to expose such official malfeasance to broader scrutiny." *Id.*

The plaintiffs first contend that their statements were not a part of their official duties because they learned of Mullarkey's unfounded allegations after they arrested Ray. Yet the plaintiffs admit that their duties included "processing arrests through [the] District Attorney's office, requesting [the] [D]istrict [A]ttorney's office for advice on certain methods to utilize on investigations, and completing it through the court system, whether it be a trial or through guilty pleas." Therefore, by their own admission, the plaintiffs' official duties did not end when they arrested Ray.

Second, the plaintiffs maintain that their speech was not made pursuant to their official duties because Chief Jones ended his own internal investigation into

whether Kolatski disclosed confidential information to Mullarkey. Chief Jones reasoned that because the arrest had already taken place, the detectives' discussion with Mullarkey did not pose a threat to the investigation. The plaintiffs argue that this demonstrates that their official duties concluded as soon as they arrested Vincent Ray. As explained above, however, the plaintiffs concede that their duties continue after a suspect's arrest. Moreover, Chief Jones' investigation does not bear on whether the plaintiffs' speech was made pursuant to their official duties.

Finally, Kolatski and Morales argue that their speech was not made pursuant to their official duties because they were unsure about how to handle Mullarkey's allegations. However, the plaintiffs' confusion about which course of conduct to take in dealing with Mullarkey's allegations does not indicate that they were not acting pursuant to their official duties as police officers.

After reviewing the record, we conclude that Kolatski's speech was not protected under the First Amendment because it was made pursuant to his official duties. Kolatski told Morales about Mullarkey's allegations because Morales recruited Kolatski to assist him in arresting Ray. As a result, Kolatski had a duty to apprise Morales of any information pertinent to the investigation. Consequently, the judgment in favor of Kolatski must be reversed.

As for Morales, his conversation with A.D.A. Chisholm was made pursuant to his official duties

because he met with Chisholm in his capacity as a VCD officer. They met to discuss Vincent Ray's arrest and review the arrest report. It was Morales' duty to assist Chisholm in the proper presentation of charges by providing him with the arrest reports and details of his investigation. Morales informed Chisholm of Mullarkey's allegations against Chief Jones and Deputy Chief Ray in response to Chisholm's inquiry into the pedigree report's missing page. Morales did not meet with Chisholm on his own time to report information that was unconnected to anything he was working on. Indeed, Morales's speech concerned a case that he was assigned to investigate. Furthermore, the Milwaukee Police Department requires officers to report all potential crimes.[3] By informing A.D.A. Chisholm of the allegations against Chief Jones and Deputy Chief Ray, Morales was performing that duty as well. Accordingly, his conversation with A.D.A. Chisholm is not protected under the First Amendment after *Garcetti*.

Morales' December 8 deposition testimony is a different story. In his deposition, Morales testified about Mullarkey's allegations, his conversation with A.D.A. Chisholm, and his opinion that Kolatski was transferred because they had reported the allegations against the Chief and Deputy Chief. Being deposed in

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[3] The dissent emphasizes the fact that Morales testified that he had the discretion whether or not to investigate Mullarkey's allegations. However, when Morales chose to exercise that discretion he did so pursuant to his job duties.

a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do. Nonetheless, Morales testified about speech he made pursuant to his official duties and we must determine whether that fact renders his deposition unprotected. We hold that it does not.

The purpose of *Garcetti* was to allow government employers greater influence over speech that owes it existence to a public employee's professional responsibilities and that is damaging to the government's capacity to conduct public business. 126 S.Ct. at 1958 ("Government employers . . . need a significant degree of control over their employees' words and actions. . . . "). Here, because the substance of Morales' speech is the same, it poses the same threat to the MPD regardless of whether it is said to A.D.A. Chisholm or in a deposition. We recognize the oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. Indeed, this is exactly the concern that Justice Stevens voiced in his dissent in *Garcetti*: "[I]t is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description." 126 S.Ct. at 1963. Despite Justice Stevens' admonishment, *Garcetti* established just such a framework, and we are obliged to apply it. As a result, although we hold that Morales' conversation with Chisholm was unprotected speech, his deposition testimony was protected.

Thus, we are faced with a difficult situation because Morales presented the jury with evidence of both his protected and unprotected speech. We do not know whether the jury found that Chief Jones and Deputy Chief Ray retaliated against Morales solely on the basis of protected speech, unprotected speech, or a combination of both.[4] Because of our uncertainty, we remand to the district court for a new trial on Morales' claims.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's ruling denying the defendants' motion for judgment as a matter of law with regard to Kolatski, and we REMAND for a new trial on Morales' claims.

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[4] The dissent contends that "it is highly unlikely that the jury relied" on Morales' conversation with A.D.A. Chisholm as the cause of Morales' demotion. The dissent relies solely on timing, stating that Morales was transferred "shortly" after his December 8 deposition testimony. In fact, Morales was transferred almost two months after he gave his deposition testimony. Moreover, the trial transcript reveals that the focus of Kolatski's and Morales' testimony dealt with the Ray investigation and Morales' conversation with A.D.A. Chisholm, not Morales' deposition testimony. In short, we cannot determine which speech the jury relied upon to find that the defendants retaliated against Morales.

ROVNER, *Circuit Judge*, concurring in part and dissenting in part. A jury found that these officers were reassigned to undesirable posts in retaliation for their speech. After *Garcetti,* the first question we must answer is whether the speech at issue was "made pursuant to the employee's official duties." *Garcetti,* 126 S. Ct. at 1955. But before we answer that question, we must discern exactly what speech is at issue. *Green v. Board of County Comm's,* 472 F.3d 794, 799 (10th Cir. 2007) (as a starting point in a *Garcetti* analysis, the court must determine what speech and conduct are at issue). As the majority notes, the speech at issue for Detective Kolatski was his conversation with Officer Link and Mr. Mullarkey in the Gold Rush restaurant, and his subsequent conversation with Lieutenant Morales on the way back to the police station after picking up dinner.[1] These discussions both occurred on a single day in April 1998. In each instance of speech, Detective Kolatski was either investigating a possible crime or conveying information about a possible crime to other officers who were more intimately involved in the investigation and arrest of Vincent Ray. The defendants demoted Detective Kolatski only a few days later and a jury found that the demotion was retaliation for his speech. Because I agree that Detective Kolatski's speech was made pursuant to his official

[1] At the time of the events at issue here, Detective Kolatski and Lieutenant Morales both held the rank of police officer. They received their respective promotions prior to the time of trial and I will use their more current designations here.

duties, I concur in the majority's holding that his speech was not protected by the First Amendment. The Supreme Court remarked that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." *Garcetti,* 126 S. Ct. at 1962. Detective Kolatski was performing his job admirably at the time of these events, and although his demotion for truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti* it does not offend the First Amendment. In *Garcetti,* after all, the Court wished to avoid a rule that would mandate "judicial oversight of communications between and among government employees and their superiors in the course of official business." 126 S. Ct. at 1961.

The case of Lt. Morales is another story. The speech at issue for Lt. Morales consisted primarily of his discussions with the district attorney's office and the deposition he gave many months later in an unrelated civil case. We review *de novo* the district court's denial of the defendants' motion for judgment as a matter of law. *Erickson v. Wisconsin Dept. of Corr.,* 469 F.3d 600, 601 (7th Cir. 2006); *Davis v. Wisconsin Dept. of Corr.* 445 F.3d 971, 975 (7th Cir. 2006); *Byrd v. Illinois Dept. of Pub. Health,* 423 F.3d 696, 712 (7th Cir. 2005). In conducting that review, we must view the facts in the light most favorable to Lt. Morales, the party opposing the motion, and we must disregard all evidence favorable to the moving parties that the jury was not required to believe. *Erickson,* 469 F.3d at 601; *Davis,* 445 F.3d at 975. We

may overturn a jury verdict in favor of Lt. Morales only if no reasonable jury could have found for him. *Erickson,* 469 F.3d at 601; *Davis,* 445 F.3d at 975. *See also Byrd,* 423 F.3d at 712 (in reviewing a district court's decision to deny a Rule 50 motion, we must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, and assure that the jury was presented with a legally sufficient basis to support the verdict).

Recall that Lt. Morales's discussions with the district attorney's office arose when he attempted to deliver Vincent Ray's incomplete arrest report to that office. The arrest report was missing the first page of the so-called "pedigree report" that identified the Deputy Chief of Police, Monica Ray, as Vincent Ray's sister and listed her address as Milwaukee County. The evidence at trial demonstrated that this rather vague address was due to Monica Ray's directive not to list her name or address on the report and to change Ray's address to that of "a fucking light pole" if necessary. R. 145, at 723. The officers who were attempting to comply with the directive of the Deputy Chief while simultaneously trying to avoid filing a false report decided that "Milwaukee County" was a specific enough address for both Ray and the light pole. R. 145, at 727. All of Lt. Morales's comments about the Chief and Deputy Chief to the district attorney came in response to questions about the missing page of the pedigree report. At the time, Lt. Morales was on duty, delivering a report he was obliged to deliver, and assisting the district attorney

in Vincent Ray's prosecution. However, as Lt. Morales testified, although he was obliged to deliver the report and assist in Ray's prosecution, he was not obliged to report his suspicions about why the report page was missing. R. 144, at 628, 641, 646. In disclosing his suspicions, he went beyond his work duties.

The majority relies in large part on an assumption that Lt. Morales was obliged under department policy to report all potential crimes and thus was speaking pursuant to his job duties when he reported possible misconduct by the Chief and Deputy Chief to the district attorney. But Lt. Morales testified that, although that was the department rule, in practice, he had considerable discretion in determining whether to report or pursue investigation of a potential crime. *See* R. 143, at 500-03. At trial, Lt. Morales was asked, "In the course of conducting an investigation, what kind of discretion do you as a police officer have to do the investigation? In other words, if you come upon information, what discretion do you have to even investigate?" He answered, "I have discretion not to investigate it." R. 143, at 501-02. Lt. Morales also testified that he is "not duty bound" to investigate when he receives information about potential wrongdoing. R. 143, at 502. Rather, he has the discretion to weigh the facts at hand, and in light of other investigations he is conducting, may elect not to pursue the information further. R. 143, at 502-03. Thus, when he saw that Vincent Ray failed to show up for three scheduled meetings that had been reported to commanding officers, when he learned

about Mr. Mullarkey's allegations that the Chief and Deputy Chief had been present with Vincent Ray at a time they both knew he was wanted on warrants, and when he heard the Deputy Chief's directive to keep her name and address off the pedigree report, he was not obliged to report his suspicion that the missing report page was related to these events. In short, he had the "option to ignore it." R. 144, at 549. *See also* R. 144, at 551 ("Again, I had the discretion. I could have ignored all of this."). In fact, he testified that, *as a police officer,* he could not do anything with this information or his suspicions:

> I couldn't do anything with it. I'm a police officer at that time. The allegations are against the third person in command and the Chief of Police. I had to give it to someone outside of the police department.

R. 144, at 547. The Chief himself testified that he was unsure what he would have done if he had been in Lt. Morales's position, where someone had told him the Chief of Police had possibly been involved in criminal activity:

> [W]hat would I do? I don't know. I ask myself that. Would I go back and tell somebody within the police department? No.
>
> I think if the officer felt that that was the place that he needed to reveal any information he had, the District Attorney's Office was an appropriate place for it to happen. The District Attorney has investigators that have arrest powers that they could send out

> to investigate. Obviously, the District Attorney, the Deputies, can do some investigation themselves or inquiries themselves.

R. 143, at 365.

The *Garcetti* majority was not faced with the situation we have here and admittedly gave us no "comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti,* 126 S. Ct. at 1961. The Court did offer some hints on how this analysis should be performed. The Court instructed that "[t]he proper inquiry is a practical one." *Garcetti,* 126 S. Ct. at 1961. The Court rejected the notion that we were limited to job descriptions in determining the nature of official duties because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Garcetti,* 126 S. Ct. at 1962. Such appears to be the case here where the departmental rule differed from the manner in which the officers actually performed their duties. Because the evidence that the jury was entitled to believe on this point contradicts the majority's assumption, I would not rely on Lt. Morales's supposed duty to report all potential wrongdoing in determining whether this speech was protected by the First Amendment.

There are other hints in *Garcetti* that help dictate the analysis here. The Court was concerned, for example, that "[o]fficial communications have official consequences," and that "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti,* 126 S. Ct. at 1960. The Court opined that employees may receive protection for expressions made at work rather than publicly, and that it also is not dispositive that the speech concerns the subject matter of the plaintiff's job. 126 S. Ct. at 1959. In *Garcetti,* the Court found that the significant factor was that Ceballos' memo was written pursuant to his official duties:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Garcetti, 126 S. Ct. at 1960. The Court noted that Ceballos did not act as a citizen when he conducted his daily professional activities; rather when "he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee." 126 S. Ct. at 1960. The Court also characterized Ceballos's memo as the "work product" of a government employee. The Court commented that government employees who make public statements outside the course of performing their duties retain First

Amendment protection because that is the kind of activity engaged in by persons who do not work for the government. Thus, a letter to a local newspaper is protected as is a discussion of politics with a co-worker. *Garcetti,* 126 S. Ct. at 1961.

We must consider, then, whether Lt. Morales's comments to the district attorney constitute "work product," whether his words owed their existence to his professional responsibilities, whether it is speech that his employer commissioned or created, or whether it is the kind of activity engaged in by persons who do not work for the government. Lt. Morales certainly became aware of the facts that he reported and formed the opinions that he expressed because of his work in investigating and arresting Vincent Ray. But for his job duties, Lt. Morales would not have known that Vincent Ray failed to show up for three meetings that had been reported up the chain of command; he would not have been aware of Mr. Mullarkey's allegations; he would not have been privy to Monica Ray's directive to keep her name and address off the pedigree report. The fact that his speech concerned the subject matter of his employment is not dispositive, though, because in *Garcetti,* the Court reaffirmed the principle that the First Amendment protects some speech related to the speaker's job, at least in part because front line workers like teachers (as was the case in *Pickering*) or police officers (as we have here) are, as a class, most likely to have informed and definite opinions about matters of public concern related to their jobs.

Garcetti, 126 S. Ct. at 1959 (citing *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979), and *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.,* 391 U.S. 563 (1968)). When he spoke to the district attorney, Lt. Morales was on duty and responding to questions about papers he was obliged to present to the state's attorney as part of his official job duties. However, because Lt. Morales was not required, as a practical matter, to report these allegations, this is a close case under *Garcetti.* The information that Lt. Morales conveyed was work product only in the sense that he learned the information while at work. But the work he was paid to perform that day, to paraphrase *Garcetti,* was the prosecution of Vincent Ray. Both government employees and persons who do not work for the government may report possible wrongdoing or crimes by government officials. In this case, reporting possible wrongdoing was beyond the scope of Lt. Morales's required job duties.

Construing the facts in favor of Lt. Morales, he may have begun his conversation with the district attorney as a police officer, but when he went beyond his obligations as a police officer and decided to disclose his suspicions about the Chief and Deputy Chief, he was speaking to the district attorney as a witness to public corruption, in the same fashion any citizen who witnessed suspicious conduct by a government official might speak. *See Freitag v. Ayers,* 468 F.3d 528, 545 (9th Cir. 2006), *cert. denied,* 127 S. Ct. 1918 (2007) (where it was not part of jail

guard's official tasks to complain to a senator or inspector general about the failure of jail officials to respond to charges of sexual harassment at the jail, the guard was speaking as a citizen when she exposed official malfeasance to broader scrutiny and thus her speech was protected by the First Amendment). In *Garcetti,* the Supreme Court noted that "when a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." 126 S. Ct. at 1961. In this case, unlike *Garcetti,* there is a relevant analogue to speech by citizens who are not public employees. Any citizen may report suspicions of public corruption to the district attorney's office, which, as I noted above, had the ability and the authority to investigate allegations of wrongdoing at the highest levels of the police department. A reasonable jury could find, and I would find, on balance, that Lt. Morales spoke as a private citizen when he conveyed his suspicions to the district attorney and his speech was therefore protected by the First Amendment.

But even if the discussions with the district attorney were unprotected, I am not convinced that the jury found those discussions to be the sole, or even the primary, motivating factor in the defendants' retaliation. In fact, it is highly unlikely that the jury relied on those stale conversations as the cause of Lt. Morales's demotion. The discussions with the district attorney occurred in April 1998 and no action was taken against Lt. Morales until approximately nine

months later, shortly after he gave a deposition in an unrelated civil case. Approximately seven months after Lt. Morales met with the district attorney, in December 1998, he and Officer Link gave depositions in the case of *Kuchenreuther v. Jones.* In *Kuchenreuther,* another officer sued Chief Jones for retaliating against her for exercising her First Amendment rights. At his deposition, Lt. Morales testified about the Mullarkey incident and stated that he believed Detective Kolatski was transferred as a result of events connected with the arrest of Vincent Ray and the aftermath of the Mullarkey allegations. Lt. Morales was transferred approximately six weeks after that deposition. Officer Link, who was not a plaintiff here, also was transferred (albeit temporarily) to a considerably less desirable position shortly after the depositions.

The key question, then, is whether that deposition testimony was given pursuant to Lt. Morales's official duties. The district court found that Lt. Morales's deposition could not be tied to any of his required duties as a police officer. The majority does not address that finding by the district court and thus does not address whether and to what extent we should defer to the district court's fact-finding. Even assuming that we need not defer to the district court at all, though, I would find, as the majority has found, that Lt. Morales's deposition was given as a citizen and not pursuant to official duties.

The defendants make no attempt to demonstrate that testifying at a civil deposition for a co-worker's

lawsuit was part of Lt. Morales's job duties. Nor could they. There is nothing in the record below to suggest that the deposition testimony was work that Lt. Morales was expected to perform as part of his formal or informal job duties, that it was conducted pursuant to his job duties or at his employer's behest, that it was work product of the police department, that it was official speech, or that it was one of the tasks he was paid to perform. Although the subject matter of the deposition related to information Lt. Morales learned on his job, his testimony owed its existence not to his job but rather to a subpoena in a lawsuit. *See Fairley v. Fermaint,* 482 F.3d 897, 902 (7th Cir. 2007). In *Fairley,* county jail guards brought § 1983 claims against the county sheriff and other guard personnel, claiming they were harassed for exercising their First Amendment right to speak out against abuse of prison inmates. 482 F.3d at 899. The defendants sought to invoke *Garcetti* for the proposition that the plaintiffs' speech in the workplace is not protected by the First Amendment. We noted that, under the plaintiffs' theory, the "defendants reacted adversely to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits." *Fairley,* 482 F.3d at 902. Because "[a]ssistance to prisoners and their lawyers in litigation is not part of a guard's official duties," we needed to determine what part of the defendants' retaliation could be traced to the plaintiffs' litigation activity as opposed to events at work. 482 F.3d at 902. *Fairley* applies directly to the

circumstances we have here, where it was not part of Lt. Morales's job duties to assist his fellow officer in her suit against the Chief.

Because they cannot demonstrate that the deposition was given pursuant to Lt. Morales's job duties, the defendants rely entirely on an argument that deposition testimony about unprotected speech does not constitute protected speech. Unlike the majority, I would find that the underlying speech was protected but I will assume for the sake of argument that it was not. The defendants rely on *Morris v. Crow,* 142 F.3d 1379 (11th Cir. 1998), and *Kirby v. City of Elizabeth City, N.C.,* 388 F.3d 440 (4th Cir. 2004), for the proposition that Lt. Morales's deposition testimony was unprotected speech. Neither of these cases supports the defendants' position. Morris was an employee of the sheriff's department who was called upon to investigate an accident in which an unmarked sheriff's car, en route to an emergency call, collided with a citizen's vehicle, killing the citizen. Morris investigated the accident and wrote an official report where he concluded that the officer driving the unmarked squad car was traveling more than 130 mph in a 50 mph zone without using his blue warning lights, in contravention of department policy. After Morris filed that report, the citizen's personal representative brought a wrongful death suit against the sheriff's department and Morris was deposed in connection with that suit. At the deposition, he reiterated the allegations of his report and opined that if the officer had been traveling the posted speed limit, there was

a great possibility the accident would not have occurred. *Morris,* 142 F.3d at 1381.

The appeals court found that the accident report was generated pursuant to Morris's official and customary duties. In that respect, the court appeared to have anticipated *Garcetti.* But the court then distinguished Morris's case from two others that closely resemble the facts we have here in Lt. Morales's case. *See Morris,* 142 F.3d at 1382, citing *Fikes v. City of Daphne, Tex.*, 79 F.3d 1079 (11th Cir. 1996), and *Warnock v. Pecos County,* 116 F.3d 776 (5th Cir. 1997). In *Fikes,* an officer who had no obligation to do so reported two instances of misconduct by fellow officers. In that case, the *Morris* court found, the plaintiff was not speaking pursuant to work duties but was trying to bring to light actual or potential wrongdoing on the part of government officials. In *Warnock,* a county auditor reported a number of violations of law or fiscal improprieties committed by county officials to her superiors and to appropriate law enforcement officers. Although Warnock generated her report in the normal course of her duties as an auditor, the *Morris* court distinguished her case because the plaintiff's purpose was to raise issues of public concern. Morris, on the other hand, wrote his report not to bring to light any wrongdoing but rather to accurately report an accident in the course of his employment. The court found that Morris's deposition could not "be characterized as an attempt to make public comment on sheriff's office policies and procedures, the internal workings

of the department, the quality of its employees or upon any issue at all." *Morris,* 142 F.3d at 1382. The *Morris* court thus concluded that the "mere fact that Morris's statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." 142 F.3d at 1383. Like Fikes, Lt. Morales was not obliged to report possible wrongdoing by the Chief and Deputy Chief. And like both Fikes and Warnock, Lt. Morales was attempting to bring to light issues of public concern. When read in whole, the *Morris* court found that Morris's accident report was unprotected because it was an official report made in the normal course of his duties, and his deposition was unprotected because he was not attempting to bring to light matters of public concern. It is thus difficult to see how *Morris* helps the cause of the defendants in the instant case where Lt. Morales was not obliged to report the wrongdoing and was in fact trying to bring to light a matter of grave public concern. Under *Morris,* a pre-*Garcetti* case, Lt. Morales's speech would be protected because he had no work-related duty to speak and he was motivated by a desire to bring to light possible government corruption. I note, however, that the *Morris* court's use of the speaker's motive as a factor that overrides the citizen/employee distinction cannot survive *Garcetti.* In sum, *Morris* does not aid the defendants' cause, and I also believe that *Morris,* at least in part, is no longer good law.

As for *Kirby,* another pre-*Garcetti* case on which the defendants rely, the issue was not whether the

plaintiff police officer was speaking as a citizen but rather whether his speech addressed a matter of public concern. *Kirby,* 388 F.3d at 446-47. Kirby testified at a hearing before a City Personnel Appeals Committee regarding a grievance filed by a fellow officer. That officer had been disciplined for damaging his police car by failing to properly maintain it. Kirby testified about the maintenance history of the fellow officer's car and provided an opinion about the maintenance and driving habits of that officer. 388 F.3d at 443. The court found that Kirby's speech did not involve a matter of public concern but rather related only to the interests of the officers involved. Moreover, the court found, the fact that Kirby's testimony was given in a public hearing did not transform it into a matter of public concern. No one could argue in the instant case that allegations of wrongdoing against the two highest ranking members of the Milwaukee Police Department did not touch on a matter of public concern. *Kirby* is irrelevant to the issue before this court. *See also Green v. Barrett,* 207 WL 754634 (11th Cir. Mar. 14, 2007).[6]

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[6] In that case, a jailer was called to testify pursuant to her official duties, at the behest of her employer, in the normal course of work. The court found that the jailer's testimony was therefore not protected by the First Amendment. Her testimony *was* her work that day. Lt. Morales was not called to testify pursuant to his official duties. He had no work-related obligation to testify. There is no evidence in the record indicating that Lt. Morales testified at that deposition at the behest of the Chief or Deputy Chief. And, finally, there is no evidence that the deposition was given in the normal course of Lt. Morales's work. On

(Continued on following page)

Because I would find that Lt. Morales's speech was protected in its entirety by the First Amendment, I will briefly address the question of qualified immunity. I say briefly because it should be obvious to anyone and certainly to the Chief and Deputy Chief of Police that it is illegal to retaliate against a person for reporting a possible crime or for testifying under oath in a deposition as part of a judicial proceeding. In the federal system, we call such retaliation "witness tampering" or "obstruction of justice," and these principles were established long before the events in this case. *See Fairley,* 482 F.3d at 902. As we noted in *Fairley,* "no public official could think the conduct proper." *Id.* I would therefore find that the defendants were not entitled to qualified immunity. For the same reason, I would not disturb the award of punitive damages.

If, as the majority finds, Lt. Morales's discussion with the district attorney was not protected, I would still affirm the judgment rather than grant a new trial. First, given that the demotions of both Lt. Morales and Officer Link came hot on the heels of their depositions, it is reasonable to assume that the jury found that the defendants demoted Lt. Morales because of his recent deposition and not because of a conversation he had with the district attorney some nine months earlier. As I noted above, we may overturn a jury verdict in favor of Lt. Morales only if no

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the contrary, he was essentially testifying as a witness in a civil lawsuit unrelated to his duties as a police officer.

reasonable jury could have found for him. *Erickson,* 469 F.3d at 601; *Davis,* 445 F.3d at 975. A reasonable jury could and did find in favor of Lt. Morales and I would affirm that judgment.

Second, the majority's decision to remand Lt. Morales's case for a new trial gives the defendants a gift for which they did not ask. In their request for relief on appeal, the defendants asked that we reverse the decision of the trial court and hold as a matter of law that all of the relevant speech is not protected by the First Amendment. In the alternative, the defendants asked that we find that they are entitled to qualified immunity. And finally, if we determined that the speech was protected and that they were not entitled to qualified immunity, the defendants asked that we reverse the award of punitive damages. At no time in the appeal did the defendants request a new trial. At no time did they argue that they would be entitled to a new trial if the jury was presented with evidence of both protected and unprotected speech. The majority states that we do not know whether the jury found the retaliation was due to protected speech, unprotected speech or a combination of both. Even if the majority is correct that some of the speech was unprotected, that uncertainty is irrelevant. Having failed to make such an argument, the defendants waived any claim for a new trial on that basis. *See Kramer v. Banc of Am. Sec. LLC,* 355 F.3d 961, 964 n.1 (7th Cir. 2004) (the absence of any supporting authority or development of an argument constitutes a waiver on appeal);

Hildebrandt v. Illinois Dep't of Natural Res., 347 F.3d 1014, 1025 n.6 (7th Cir. 2003) (when a party presents no argument in its brief with respect to a particular claim, any arguments with respect to that claim are waived); *Palmer v. Marion County*, 327 F.3d 588, 597-98 (7th Cir. 2003) (holding that claims not argued on appeal are abandoned, and collecting cases). The defendants took an all or nothing approach in their appeal of the judgment in favor of Lt. Morales; they are entitled to nothing. For these reasons, I concur in the judgment with respect to Detective Kolatski and respectfully dissent from the judgment with respect to Lt. Morales.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

ALFONSO MORALES and DAVID KOLATSKI,

Plaintiffs,

v.

POLICE CHIEF ARTHUR JONES, and DEPUTY MONICA RAY,

Defendants. **No. 00-CV-0618-DRH**

MEMORANDUM and ORDER

(Filed Feb. 1, 2006)

HERNDON, District Judge:

I. Introduction and Background

Pending before the Court are Defendants' motions for judgment as a matter of law, for new trial and for amended judgment (Doc. 130) and Plaintiffs' motion for attorney's fees and costs (Doc. 126). Based on the pleadings, the applicable law and the following, the Court denies Defendants' motions and grants in part and denies in part Plaintiffs' motion.

Back in May 2000, Alfonso Morales and David Kolatski, former police officers with the City of Milwaukee Police Department, filed suit against Chief Arthur L. Jones, Deputy Chief Monica Ray and the City of Milwaukee for violations of their First Amendment Rights (Doc. 1).

On January 18, 2005, after a four day trial, the jury returned a special verdict in favor of Plaintiffs Alfonso Morales and David Kolatski and against Defendants Chief Arthur L. Jones and Deputy Chief Monica Ray (Doc. 120). The jury awarded both Morales and Kolatski $20,000 in compensatory damages and $65,000 in punitive damages. The Clerk of the Court entered judgment reflecting the same on November 21, 2005 (Doc. 121).

II. Defendants' Motions

When entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. ***Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000)**. In doing so, the court must draw all inferences in favor of the nonmoving party, here Morales and Kolatski. ***Id.*; *Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002)**. The court may not make credibility determinations or reweigh the evidence; it must disregard all evidence favorable to the moving party that the jury is not required to believe. ***Reeves*, 530 U.S. at 150-51**. "That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." ***Reeves*, 530 U.S. at 151 (internal quote marks omitted)**. The Court must be particularly careful in employment discrimination cases to avoid supplanting its view of the credibility or weight of the

evidence for that of the jury. ***Hybert v. Hearst Corp.*, 900 F.2d 1050, 1054 (7th Cir. 1990).** ***See also Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998) (noting we are particularly careful in employment discrimination cases not to substitute our own view of credibility or weight of the evidence for that of the jury).** This is because employment discrimination cases often involve sensitive and difficult issues of fact, and plaintiffs often have only circumstantial evidence on which to rely. ***Hybert*, 900 F.2d at 1054.**

A district court may grant judgment as a matter of law where "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the prevailing party. ***Honaker v. Smith*, 256 F.3d 477, 484 (7th Cir. 2001).** The court may set aside the jury's verdict and enter judgment as a matter of law only when, without resolving conflicts in the testimony or otherwise considering the weight of the evidence, the evidence is such that a reasonable jury could reach only one conclusion. ***Lane v. Hardee's Food Systems, Inc.*, 184 F.3d 705, 706-07 (7th Cir. 1999); *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999); see generally *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (same standard applies for summary judgment and judgment as a matter of law).** The evidence in support of the verdict must be substantial. ***Honaker*, 256 F.3d at 484.** In ruling on a motion for new trial, the court must determine whether "the verdict is against the weight of the evidence . . . the damages

are excessive, or . . . for other reasons, the trial was not fair to the party moving." ***General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc.***, 695 F.2d 281, 288 (7th Cir. 1982).

A. Judgment in favor of Morales and against Chief Jones

Defendants argue that Morales' Judgment against Chief Jones must be reversed as there was insufficient evidence on the issue of causation. Chief Jones claims that he did not know of Morales' disclosure to the District Attorney's office which started the investigation into Chief Jones and Deputy Chief Ray. Further, Chief Jones argues that he had no knowledge of Morales' December 8, 1998 deposition and that based on the case law the length of time from April 8, 1998 to Morales' transfer on January 22, 1999 is too long of a period to connect his retaliatory motive to the transfer.

Based on the record, the Court finds that Morales presented legally sufficient evidence for a reasonable jury to find that Chief Jones knew of Morales' disclosure to the District Attorney's office which started the investigation into Chief Jones and Deputy Chief Ray for harboring a wanted felon, Vincent Ray, and that Chief Jones did know of Morales' December 8, 1998 deposition. As of March 22, 1998, both Chief Jones and Deputy Chief Ray knew about Morales and Detective Link's efforts to investigate an allegation that Vincent Ray was fortifying an apartment and

selling drugs from there. Lt. Edward Liebrecht testified that after he received a complaint by the apartment's owner that Vincent Ray was selling drugs from an apartment, he assigned Link and Morales to investigate the complaint. Furthermore, Link testified that he and Morales were ordered by Lt. James Shepard to drop every investigation they were conducting and make the Vincent Ray investigation their top priority pursuant to orders from the "Chief." Link also testified that Lt. Shepard ordered him to put together a "Matter Of" report detailing every aspect of their investigation into Vincent Ray and to provide Lt. Shepard with the report who would then forward the information up the chain of command to Chief Jones.[1] Lt. Shepard testified that he forwarded Detective Link's Matter Of report up the chain of command to Chief Jones on Sunday, March 22, 1998. Moreover, Morales and Detective Link testified that every time between March 22, 1998 and April 6, 1998 that the received a lead on where Vincent Ray was they would report the lead to their supervisor and that Vincent Ray would be absent at the planned meetings.

Moreover, there is evidence that on April 6, 1998, the date of Vincent Ray's arrest, Morales, Detective Link and Kolatski all spoke to Lt. Habeck who was in direct communication with Deputy Chief Ray about the arrest of her brother. Further on April 8, 1998, Morales was summoned to a meeting with Deputy

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[1] The Matter Of report was Exhibit 1 at trial.

Chief Ray, Captain Sucik, and Detective Link. At this meeting, Deputy Chief Ray questioned Morales as to the following areas: (1) how the District Attorney's investigation as to herself and Chief Jones began; (2) what information was given to the District Attorney's office; and (3) how Morales got that information. Specifically, Morales told Chief Deputy Ray that Kolatski learned from the owner of the Gold Rush Chicken restaurant that he saw Deputy Chief Ray, Vincent Ray and Chief Jones at Deputy Chief Ray's home when he delivered chicken to her house. Morales also told Deputy Chief Ray that he informed the District Attorney that she ordered Lt. Habeck on the evening of April 6, 1998 to keep her name out of all arrest reports; and that if Vincent Ray gave the same address as her address that his address should be changed to any other address even if that meant changing it to a "f------ street pole." Morales also told Chief Deputy Ray that on the morning of April 7, 1998 when he delivered the arrest reports to the District Attorney, the Assistant District Attorney noticed that the pedigree reports were missing and began asking questions about the reports whereabouts. Morales then informed Deputy Chief Ray that after he told the Assistant District Attorney the above information the Assistant District Attorney became concerned. Morales then told Deputy Chief Ray that based on all of those allegations, the District Attorney's office began an investigation into Deputy Chief Ray and Chief Jones for potentially harboring a known felon, Vincent Ray.

Also during this meeting, Deputy Chief Ray notified everyone present that she was going to contact her attorney and Chief Jones about these allegations. Deputy Chief Ray testified that she told Chief Jones about all that she learned at this meeting. In addition, Chief Jones testified that he had a conversation with Deputy Chief Ray and that he knew that the District Attorney's office was going to conduct interviews of himself and Deputy Chief Ray that same day.

The evidence also reveals that Deputy Inspector Schunk, the head of Internal Affairs, met with Chief Jones on April 8, 1998. Chief Jones told Deputy Inspector Schunk that Deputy Chief Ray's brother was arrested and that the officers involved were at a chicken restaurant where the owner stated that he delivered chicken to Deputy Chief Ray's home, that a man with a tattoo answered the door and that Chief Jones was standing behind him. An April 8, 1998 memo written by Deputy Inspector Schunk states the same. Deputy Inspector Schunk testified that Chief Jones wanted him to begin an investigation into the officers for discussing business at the chicken restaurant. Deputy Inspector Schunk also testified that when he had the meeting with Chief Jones, he thought that they both knew who the involved officers were. Furthermore, on April 17, 1998, Deputy Inspector Schunk interviewed Mullarkey, the chicken restaurant owner, who gave descriptions of Kolatski, Link and Morales.

The evidence also demonstrates that on April 14, 1998, Deputy District Attorney Reddin received a call from Chief Jones in the early evening. During this conversation, Chief Jones expressed that he was upset because the District Attorney's office had made inquiries as to whether Chief Jones was at Chief Deputy Ray's house at a time when Vincent Ray was there and wanted on outstanding warrants. Subsequently, on April 17, 1998, Kolatski was transferred from the Vice Control Division to night shift district patrol duty.

The evidence also shows that Chief Jones was aware of Morales' December 8, 1998 deposition in the Kuchenreuther case. Deputy Chief Ray stated that a City Attorney asked her why Kolatski was transferred from Vice Control. Similarly, Kolatskl testified during his Kuchenreuther deposition that he believed that he was transferred in retaliation for events surrounding the Vincent Ray arrest. Also, during Detective Link's December 8, 1998 deposition in the Kuchenreuther case, Detective Link testified that he thought that Kolatski was transferred in retaliation for events relating to the Vincent Ray arrest

Further, the evidence shows that Morales' January 22, 1999 transfer happened unexpectedly and that there was no documentation setting forth any legitimate reason for the transfer. Morales was on the Vice Control entry team which was a specialized unit within the Vice Control Division that required the department to make extensive payments for the extensive training. Further, Morales is a Spanish

speaking officer whose usefulness to the Vice Control Division in its war on drugs was an essential element. Further, the evidence shows that Morales was performing his duties well at the time of the transfer.

Deputy Chief Ray testified that Morales was transferred because of a reconfiguration of the Vice Control Division, because he placed high on a detective's test and he would have been ultimately transferred in any event. However, Captain Sucik and Lt. Liebrecht both testified that although reconfiguration of the Vice Control Division was being discussed in the latter part of 1998 and the early part of 1999, there was never any discussion that any officer within the division would be transferred out of the division. In fact, these officers testified that the reconfiguration would require additional officers to be assigned to the Vice Control Division. Furthermore, Chief Jones testified that he had no explanation or knew of no reason for why Morales was transferred on January 22, 1999. Not one witness testified that they had knowledge of any person ever being transferred out of Vice Control Division as a police officer because they ranked high on a detective's test and would be transferred in a short time in any event.

Additionally, the record shows that Chief Jones was upset with the District Attorney's investigation. The record demonstrates that based on Detective Link's assignment to the Prostitution Unit within days of his December 8, 1998 deposition, an assignment that Detective Link stated was the worst assignment he had within the Milwaukee Police

Department, together with Kolatski's prior transfer and Chief Jones' prior agitation regarding the District Attorney's investigation, there is enough evidence for a reasonable jury to find that Chief Jones was angry enough to transfer Morales based on the conversations Morales had with the District Attorney's office and his December 8, 1998 deposition in the Kuchenreuther case. Thus, the Court denies Defendants' motion as to this request.

B. Judgment in favor of Kolatski and against Chief Jones

Defendants also argue that Kolatski's Judgment against Chief Jones must be reversed as there is insufficient evidence to sustain the verdict. Chief Jones argues that he had no knowledge of Kolatski's involvement with the chicken man. Based on the record, the Court finds that Kolatski presented legally sufficient evidence for a reasonable jury to find that Chief Jones knew of Kolatski's involvement in providing information concerning the chicken delivery made to Deputy Chief Ray's home wherein Chief Jones, Deputy Chief Ray and Vincent Ray were all present.

The evidence reveals that on April 8, 1998, Morales specifically told Deputy Chief Ray that it was Kolatski who learned from the owner of Gold Rush Chicken that a couple of weeks earlier he delivered chicken to Deputy Chief Ray's home and at that time Chief Jones and Vincent Ray were also present.

Thereafter, Deputy Chief Ray called Chief Jones on April 8, 1998 and told him about all the Information given to the District Attorney's office. She also told him how the information was learned and who provided the information. That same day, Chief Jones met with Deputy Inspector Schunk to initiate an Internal Affairs Division investigation because Deputy Chief Ray's brother had been arrested and the officers involved had a conversation with the owner of a chicken restaurant who informed the officers that when he delivered chicken to Deputy Chief Ray's home Chief Jones, Deputy Chief Ray and a man meeting Vincent Ray's description was there. Also, Chief Jones testified that there was a possibility that the names of the officers were mentioned in his meeting with Deputy Inspector Schunk, but he did not know for sure. While Schunk testified that in this meeting with Chief Jones on April 8, 1998, he thought that they both knew who the officers were. Moreover, the arrest report of Vincent Ray, Trial Exhibit 6, lists Kolatski as the assisting office to the arresting officer Morales.

In addition, the record shows that on April 17, 1998, Kolatski's transfer date, Schunk interviewed the owner of the chicken restaurant who gave descriptions of the three officers. These descriptions were similar to those of Kolatski, Link and Morales. Schunk verified this in his testimony.

Furthermore, the evidence demonstrates that Kolatski's transfer was unexpected, that there was no legitimate reason for the transfer, that there was no

documentation explaining his transfer, that he was performing his job well and that his usefulness to the unit was not completed. In addition, Captain Sucik testified that he knew of no reason for why Kolatski was transferred and that had it been his decision Kolatski would have remained a member of the Vice Control Division. Lts. Liebrecht, Habeck, and Shepard testified to the same. In fact, Chief Jones stated that he knew of no reason why Kolatski was transferred on April 17, 1998.

Deputy Chief Ray was the only person to testify as to why Kolatski was transferred. Deputy Chief Ray testified that after conversing with Chief Jones she decided to transfer Kolatski because Kolatski and Deputy Chief Ray's administrative assistant had an argument over the use of the administrative assistant's phone. Deputy Chief Ray admitted that she did not investigate the facts surrounding the phone incident. Deputy Inspector Schunk testified that under these facts an officer/employee would not be transferred. Also, Captain Sucik testified that he knew about the incident with the phone; that he told Kolatski not to use the phone anymore and that one incident would not have resulted in Kolatski's transfer. Similarly, Lts. Liebrecht, Habeck and Shepard all testified that this incident would not have resulted in a transfer. Moreover, Sucik, Liebrecht, Habeck, and Shepard all described Kolatski's use of the phone as proper protocol for members of the Vice Control Division.

Based on the evidence a reasonable jury could have found that Chief Jones would have been motivated to transfer Kolatski based on the information he learned from the owner of the chicken restaurant which Morales supplied to the District Attorney. In fact, Deputy District Attorney Reddin testified that Jones was quite upset over the investigation into himself based on the chicken owners's allegations. Thus, the Court denies Defendants' motion as to Kolatski's judgment against Jones.

C. Judgment in favor of Morales and against Deputy Chief Ray

Defendants also argue that the verdict in favor of Morales and against Deputy Chief Ray should be set aside as supported by insufficient evidence. Specifically, that the statements that Morales made to Deputy Chief Ray happened approximately nine months before his January 22, 1999 transfer and that she did not know of his December 8, 1998 deposition.

As stated supra, the evidence establishes that Deputy Chief Ray informed Chief Jones about all the information concerning her brother's arrest and who provided it to the District Attorney's office. In fact, Deputy Chief Ray was so concerned that she hired a personal attorney who went with her to be interviewed by the District Attorney. The evidence also revealed that Deputy Chief Ray admitted she was asked by a City Attorney following the Kolatski deposition on December 8, 1998 as to why Kolatski

was transferred from the Vice Control Division. Moreover, it is possible that a reasonable jury did not believe Deputy Chief Ray's explanation as to why Morales was transferred. Based on the evidence, a reasonable jury could have found that Deputy Chief Ray knew of Morales' December 8, 1998 deposition and had a hand in causing Morales to be transferred on January 22, 1999. Thus, the Court denies Defendants' motion as to this issue.

D. Judgment in favor of Kolatski and against Deputy Chief Ray

Defendants argue that the verdict in favor of Kolatski and against Deputy Chief Ray cannot stand. In particular, Defendants contend that Deputy Chief Ray did not know that it was Kolatski who learned of the chicken restaurant owner's allegations or that he provided the information to Morales.

As stated previously, the evidence shows that on April 8, 1998, Morales was summoned to a meeting with Deputy Chief Ray. In that meeting Morales testified that Deputy Chief Ray questioned him regarding what information was given to the District Attorney, how that information was learned, and what the District Attorney's office was going to do with that information. In response to the questions, Morales informed Deputy Chief Ray that Kolatski was the person who learned of the chicken restaurant owner's allegations that he had delivered chicken to her house and at that time her, Chief Jones and

Vincent Ray were present. Moreover, it is possible that a reasonable jury did not believe Deputy Chief Ray's explanation as to why Kolatski was transferred. Based on the evidence, a reasonable jury could have found that Deputy Chief Ray knew that Kolatski talked to the chicken restaurant owner. Therefore, the Court denies Defendants' motion as to this issue.

E. Qualified Immunity

Next, Defendants argue that they are entitled to judgment as a matter of law because Plaintiffs' speech was not protected, therefore, they are entitled to qualified immunity. Specifically, Defendants maintain that the Plaintiffs' speech is not protected as these incidents were required job duties or casual chit-chat. The Court does not agree.

The Supreme Court has held that the speech of a government employee warrants First Amendment protection if that speech "addresses a matter of public concern." ***Connick v. Myers*, 461 U.S. 138, 147 (1982)**. Whether the employee's speech constitutes public concern must be determined "by the content, form, and context of a given statement, as revealed by the record as a whole." ***Id.* at 147-48**. The Seventh Circuit has determined that the content of the speech is the most important. ***See Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996); *Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993)**.

The Court must also seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public service." ***Connick*, 461 U.S. at 142 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968))**. "In terms of content, this court has determined that police protection and public safety are generally a matter of public concern." ***Delgado v. Jones*, 282 F.3d 511, 517 (7th Cir. 2002) (citing *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (*en banc*) ("It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety."); *Glass*, 2 F.3d at 741 ("Obviously, speech that focuses on police departments (and ultimately police protection and public safety) involve matters of great public concern.")**.

Here, the Court finds that Kolatski's relaying of information to Morales concerning the chicken restaurant owner's allegations that there was a possibility that Chief Jones and Deputy Chief Ray were in the presence of a known felon and thereby harboring that known felon was protected speech. It was a matter of public concern; it was a communication by a law enforcement officer that contained information essential to a complete and objective investigation of serious criminal activity which is consider to be "content" that implicates public concern. This speech was also information regarding potential misconduct on behalf of Chief Jones and Deputy Chief Ray for

harboring a known felon which is a violation of state law, serious in nature and directed at the heads of the Milwaukee Police Department. ***See Spiegla v. Hull*, 371 F.3d 928, 937 (7th Cir. 2004) ("Unscrupulous public employees may find ways to exploit the resources and opportunities available to them through their offices. Perhaps the public's best protection against these few wayward individuals is the insider who is willing to speak up and shed light on her colleagues' improprieties. Recognizing the "whistleblower's" important role, our cases have consistently held that speech alleging government corruption and malfeasance is of public concern in its substance) (citations omitted)**. Similarly, the Court finds that Morales' informing the District Attorney's office of the allegations is protected for the same reasons. Additionally, Morales' testimony in his December 8, 1998 as to why Kolatski was transferred is an opinion that cannot be tied to any required duty of his position as a police officer and, thus, that speech is protected as well. Moreover, the Court finds that Kolatski's statements to Link and Morales were not idle chit-chat. In fact, these statements concern allegations that potentially implicated Chief Jones and Deputy Chief Ray in criminal activity and the fact that Chief Jones and Deputy Chief Ray were the heads of the Milwaukee Police Department made that speech a matter of public concern.

Additionally, Kolatski's speech to Morales about the chicken restaurant owner is protected speech and

not part of required job duties. It had no usefulness in Vincent Ray's prosecution but it was volunteered information needed for a complete investigation into the potential serious criminal misconduct of Defendants.

Furthermore, as the Seventh Circuit stated in ***Delgado*, 282 F.3d at 520**, a qualified immunity analysis involves whether the law was "clearly established" at the time of the alleged violation. "In *Gustafson*, this court observed, "It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position." 117 F.3d at 1020. . . . Although the defendants argue that *Gonzalez* somehow altered the First Amendment landscape in this Circuit, the alleged retaliation against Delgado occurred about eight months before our decision in *Gonzalez*, eliminating any possibility of reliance." ***Id.*** Thus, the same applies to the case at bar. Defendants' reliance on ***Garcetti v. Ceballos*** and ***Gonzalez v. Chicago*** is irrelevant. The retaliation against Morales and Kolatski occurred approximately two years in advance of the ***Gonzalez*** decision and over six years in advance of a decision that has yet to be decided by the Supreme Court in ***Garcetti v. Ceballos***. Therefore, the Court finds that Defendants are not entitled to qualified immunity. Accordingly, the Court denies Defendants' motion based on qualified immunity.

F. Compensatory Damages

Defendants contend that the compensatory damages awarded to each of the Plaintiffs are excessive. Defendants contend that there is no evidence that either Morales or Kolatski had been subjected to public statements by either Jones or Ray regarding their transfers. Further, Defendants contend that Plaintiffs did not substantiate their emotional distress. The Court does not agree.

The Court may grant Defendants a new trial based on the excessiveness of the jury's award only if the award is "monstrously excessive" or the award has no rational connection to the evidence, indicating that the award was "merely a product of the jury's fevered imaginings or personal vendettas." ***EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1285 (7th Cir. 1995); accord *Kapelanski v. Johnson*, 390 F.3d 525, 532 (7th Cir. 2004); *DeBiasio v. Illinois Central Railroad*, 52 F.3d 678, 687 (7th Cir. 1995)**. A remittitur rather than a new trial may be more appropriate when a party seeks to establish the need for a new trial based on the size of the verdict. ***See Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1263 (7th Cir. 1986) ("Only in an unusual case will a court order a new trial on liability because of an error in assessing damages or in apportioning them among multiple defendants.")**.

Here, the Court finds that Defendants have not shown that the awards are monstrously excessive or

that the awards have no rational connection to the evidence. Defendants' argument ignores testimony regarding Plaintiffs' mental anguish, anxiety, sleeplessness, stress, marital hardship and loss of self esteem. These factors combined can establish the loss each Plaintiff suffered from which a jury could gauge the personal indignity suffered as a result of Defendants' actions. Further, the jury could arrive at an estimation of each of the Plaintiffs' loss, by comparing the circumstances of their lives before and after the transfers. The $20,000 award is also not excessive in comparison to awards in similar cases. For example, in ***Gustafson v. Jones*, 290 F.3d at 899**, a case very similar to this one, an award of $10,000 in compensatory damages and $180,000 in punitive damages was upheld. ***See also EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286 (7th Cir. 1995) ("Comparability of awards must be adjusted for the changing value of money over time.")**. Because the Court finds that the compensatory damages awarded to Plaintiffs had a rational connection to the evidence and were not excessive, the Court denies Defendants' request for a new trial or remittur on the issue of compensatory damages.

G. Punitive Damages

Defendants also argue that the Court should set aside the jury's award of punitive damages because there was not clearly established law prohibiting the transfer of any employee based on statements the employee might make as part of their regular job

duties. Defendants also argue that the awards are excessive. Additonally, Defendants contend that there was no evidence of public condemnation of either of the Plaintiffs by either of the Defendants; there was no evidence of any efforts to terminate or suspend either of the Plaintiffs; and there was no evidence of any other actions by either of the Defendants against either of the Plaintiffs other than the transfers. The Court rejects Defendants' arguments.

The Supreme Court directed courts reviewing punitive damage awards to consider three guides: (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual harm suffered and the punitive damage award; and (3) the difference between the punitive damages awarded and penalties imposed in similar cases. ***BMW of North America v. Gore*, 517 U.S. 559, 575 (1996)**. The Supreme Court has recognized that there are limits on acceptable punitive damage awards and that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." ***State Farm Mut. Auto. Ins. Co. v. Campell*, 123 S.Ct. 1513, 1524 (2003)**.

As to the established law argument, the Court finds that as of 1998, the Defendants knew that they were violating a clearly established right when they transferred Plaintiffs for their speech which resulted in the District Attorney's investigation into the Defendants' potential misconduct for harboring a felon. It was established by 1998 that to transfer employees

in retaliation for their speech to less desirable assignments was in violation of the First Amendment. ***See Gustafson v. Jones*, 117 F.3d 1015, 1020 (7th Cir. 1997).**

In this case, the jury awarded plaintiffs punitive damages of $65,000, with compensatory damages of $20,000. In 2002, in a similar case, the Seventh Circuit did not disturb punitive damages of $180,000 and compensatory damages in the amount of $10,000. **See *Gustafson*, 290 F.3d at 899.** ***Gustafson*** was the first case in which Defendant Jones was found to have retaliatorily transferred police officers in violation of their amendment rights. The Plaintiffs in the case at bar received considerably less punitive damages than the Plaintiffs in ***Gustafson***. Further, Plaintiffs point out that the ratio of punitive damages to compensatory damages is 3.5 to 1. Plaintiffs claim, and the Court agrees that the "modest ration of punitive damages awarded by the jury clearly falls within the single-digit multipliers, in accord with the tradition of double and treble damages, allowed by the Supreme Court." ***Campell*, 123 S.Ct. at 1524.** Accordingly, the Court will uphold the jury's award of punitive damages and deny Defendants' motion as to the punitive damages.

H. Verdict Form as to Punitive Damages

Lastly, Defendants argue that over their objection, the Court erroneously provided the jury with a verdict form that was phrased in a manner of asking

the jury whether it would award a certain sum to each plaintiff, rather than assessing punitive damages against each of the individual defendants. Because the Court is upholding the jury verdict in all respects, the Court denies this request.

III. Plaintiffs' Motion for Attorney's Fees and Costs

Plaintiffs' counsel moves for attorney's fees and costs in this matter. In particular, Plaintiffs' counsel moves for attorney hours of 479.80 at $350 per hour rate for himself and paralegal hours of 162.30 at $120 per hour rate for his paralegal arguing that these amounts are reasonable as they reflect the prevailing market rates. In all, Plaintiffs request reimbursement of $187,406 for all attorney and paralegal fees as incurred through this motion, together with expenses of $7,398.93 for a total of $194,804.93. Defendants respond that the hours claimed are excessive as are the hourly rates claimed. Defendants contend that the reasonable loadstar fees and costs should be 394.1 attorney hours at $187 per hour: $73,696.70 plus $7,398.98 in costs. Defendants also contend that if paralegal services are included it should be 120.5 hours at $75 per hour: $9,037.50. Based on the following the Court grants in part and denies in part Plaintiffs' request for fees and costs. Specifically, the Court finds that the hours are not excessive and that Plaintiffs' counsel is entitled to $200 per hour and his paralegal is entitled to $75 per hour.

In federal court, a prevailing party is entitled to recover "costs other than attorneys' fees . . . as of course." **Fed.R.Civ.P. 54(d)**. Under **42 U.S.C. § 1988**, a prevailing party in a § 1983 action may also recover "a reasonable attorney's fee as part of the costs." Courts use the well-known "lodestar" method to determine a reasonable amount of fees. ***E.g., People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996); *Hensley v. Eckerhart*, 461 U.S. 424, 433-37, (1983)**. Under this method, the court first determines the "lodestar" by multiplying the hours reasonably expended on the case by a reasonable hourly rate. ***People Who Care*, 90 F.3d at 1310**. The court may then adjust this award based on various factors, ***see id.* at 1310 n. 1**, the "most critical" of which is the degree of success obtained by the movant, ***Hensley*, 461 U.S. at 436**. The movant bears the initial burden of documenting its fees to the satisfaction of the court; once it has done so, those fees are presumptively appropriate unless challenged by the opposing party. ***Tomazzoli v. Sheedy*, 804 F.2d 93, 96 (7th Cir. 1986)**.

Looking at the documents supplied by Plaintiffs' counsel as to the hours, the Court finds that they are reasonable. The Court finds that the hours Plaintiffs' counsel spent on preparing for depositions are fair as two of the depositions were of Jones and Ray and the other was Dale Schunk, the commander of the Internal Affairs Division; these are crucial witnesses to Plaintiffs' case. The Court also finds that the paralegals attendance at the depositions to be appropriate

as Plaintiffs' counsel is a solo practitioner. Next, Defendants object to Plaintiffs' counsel's 45.2 hours summarizing the depositions arguing that this is paralegal work and should be billed at that rate. The Court does not agree with Defendants' position as it is not illogical or unheard of for a solo practitioner to summarize depositions. Further, the Court concludes that the hours Plaintiffs' counsel expended to respond to the summary judgment motion to be reasonable as the proposed finding of facts were 49 pages and the response brief was 29 pages. Because the Defendants have not demonstrated that Plaintiffs' counsel's hours need to be reduced, the Court finds that the hours presented by Plaintiffs' counsel and his paralegal are reasonable.

Next, the Court must address whether Plaintiffs' counsel's requests for $350 per hour for his services and $120 per hour for paralegal services are reasonable. Defendants object to these rates and urge the Court that $187 per hour for Plaintiffs' counsel's services and $75 per hour for paralegal services are reasonable. Based on the pleadings submitted by the parties, the Court finds that Plaintiffs' counsel does not make his case for $350 per hour for his services nor for$120 per hour for his paralegal's services and finds that an appropriate market rate per hour is $200 for his services and $75 for the paralegal's services.

Here, there was neither a fee contract nor an agreement submitted. Further, Plaintiffs' counsel's affidavit establishes that his hourly rates are $150

per hour for labor and labor related work for the Wisconsin Professional Police Association and the Milwaukee Police Supervisor's Organization. His affidavit also shows that his hourly rate is $200 "for various plaintiff litigation and business transactions." He does not attest to ever charging or receiving $350 per hour in any matter. The request for $350 per hour is not supported by either Plaintiffs' counsel's billing practices or by the attorney affidavits he submitted: (1) Walter Kelly and (2) John Fuchs.[2] Both affidavits suggest an amount of $250 per hour as a reasonable amount for Plaintiffs' counsel. However, the affidavits doe not describe $250 as the prevailing rate. On the other hand, Defendants have submitted a survey for the Economics of Law section of the Wisconsin Bar. The May 2005 survey obtained data from the Milwaukee area broken down by practice area. The 2005 survey revealed that rates between $120 per hour to $250 per hour for similar work. Only two of the eight responses indicated $250 an hour. The median hourly rate is $177. Taking into consideration the ***Johnson/Hensley*** factors, the Court finds that a reduction in the hourly rates requested by Plaintiffs' counsel is appropriate. The same applies to the paralegals rate per hour. A 2005 survey of Wisconsin firms reveals that the median market rate for legal assistant

[2] Kelly's affidavit states: " . . . , I have formed the conclusion that in the Milwaukee area, a practitioner with qualifications and experience similar to Attorney Rettko would charge in the range of $250 per hour to $350 per hour for representation in cases of this sort." (Kelly Affidavit, p. 2, ¶ 4).

billing rates is $75 per hour, regardless of experience. Thus, the Court finds that a reasonable hourly rate for Plaintiffs' counsel is $200 per hour and that a reasonable hourly rate for the paralegal is $75 per hour.

Thus, the fee award will reflect (1) $95,960.00 for work billed by Plaintiffs' counsel (479.8 hours multiplied by $200); (2) $12,172.50 for work billed by the paralegal (162.30 hours multiplied by $75) and (3) $7,398.93 in costs. Accordingly, Plaintiffs are entitled to an award of attorney's fees and costs pursuant to **42 U.S.C. § 1988** in the amount of $115,531.43 ($95,960.00 + $12,172.50 + $7,398.93).

IV. Conclusion

Accordingly, the Court **DENIES** Defendants' motions for judgment as a matter of law, for new trial and for amendment of judgment (Doc. 130). Further, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' motion for attorney's fees and costs (Doc. 126). The Court **AWARDS** Plaintiffs $115,531.43 in attorney's fees and costs.

IT IS SO ORDERED.

Signed this 1st day of February. 2006.

/s/ David RHerndon
United States District Judge

UNITED STATES DISTRICT
EASTERN DISTRICT OF WISCONSIN

ALFONSO MORALES,
DAVID KOLATSKI,

Plaintiffs,

v.

POLICE CHIEF ARTHUR JONES, DEPUTY CHIEF MONICA RAY, CITY OF MILWAUKEE,

Defendants.

Case No. 00-C-618

ORDER

(Filed Mar. 29, 2004)

Plaintiffs Alfonso Morales and David Kolatski bring this action pursuant to 42 U.S.C. § 1983 against the named defendants alleging the defendants transferred them to less desirable positions within the Milwaukee Police Department ("MPD") in retaliation for engaging in speech protected by the First and Fourteenth Amendments. The defendants have moved for summary judgment pursuant to Fed. R. Civ. P. 56. The matter is fully briefed, and the court will now address the plaintiffs' claims.

FACTUAL BACKGROUND

This case is very fact-intensive. The following is but only a summary of the relevant facts in the light

most favorable to the plaintiffs. Kolatski began his career as a Milwaukee police officer in November 1988. In September 1996, he was transferred to the Vice Control Division, which is an elite police unit within the MPD. Kolatski viewed his transfer to the Vice Control Division from general patrol duty as a merit-based transfer and viewed his assignment in the Vice Control Division as a coveted position. While he was in the Vice Control Division, Kolatski was an aggressive, productive, and exceptional police officer.

Morales began his career as a Milwaukee Police Officer in 1993. In May 1997, Morales was transferred to the Vice Control Division. Like Kolatski, Morales considered his transfer to the Vice Control Division from patrol duty as a promotion and viewed it as a coveted position. While he was in the Vice Control Division, Morales also was an aggressive, productive, and exceptional police officer.

Members of the Vice Control Division would tend to view an unrequested transfer from the division as a negative occurrence. Members are transferred against their will when they are not productive, have poor investigative skills, do not personally fit in with other personnel in the Vice Control Division, or have an internal rules violation investigation pending against them that justifies their transfer. In these situations transfer is the last resort. Supervisors made efforts to work with Vice Control Division members and identify areas of improvement before any transfers occurred.

Members of the Vice Control Division are not usually transferred out of the division when they are promoted to detective or lieutenant, and it is not common for members to be transferred out of the division while they are awaiting promotion to detective or lieutenant. It is also uncommon for members of the Vice Control Division to be transferred during the middle of a major investigation. There is no set amount of time a person could be a member of the Vice Control Division, and productive members of the division have stayed in the division for decades.

The Vice Control Division was reconfigured in early 1999. The reconfiguration plan was designed to expand the division and get more personnel. The plan was to keep the people already assigned to the division within the division. There was no plan to transfer people out of the division because they had been there too long.

Defendant Arthur Jones was the MPD Chief at all times relevant to this lawsuit. He makes the ultimate decision to transfer any member from the Vice Control Division. However, he usually relies on recommendations for transfer from his deputy chiefs. Defendant Monica Ray was the MPD Deputy Chief in charge of supervising the Vice Control Division at all times relevant to this lawsuit. Deputy Chief Ray makes recommendations for transfers from the Vice Control Division whenever her captains or lieutenants recommend it or whenever she thinks it is in the best interests of the MPD.

In October 1997, Deputy Chief Ray's administrative assistant confronted Kolatski about using her desk and telephone in the course of performing his duties as a member of the Vice Control Division. The confrontation became heated. Kolatski did not violate any MPD rules when he used her desk and telephone because any member of the Vice Control Division could use any telephone or computer in the open office space. The only telephones off limits to any member of the Vice Control Division were the telephones of Deputy Chief Ray and Captain Ray Sucik, who had private offices. Kolatski was never disciplined for use of the desk.

On March 22, 1998, a call came into the Vice Control Division from a Milwaukee landlord who reported that one of his tenants, Vincent Ray, was fortifying his apartment and using it as a "drug house." The person who took the call, Lieutenant Liebrecht, notified Deputy Chief Ray because Vincent Ray was her brother. Deputy Chief Ray told Liebrecht to get officers on the investigation right away and look into whether Vincent Ray had any outstanding warrants for his arrest.

Liebrecht assigned Morales and Detective Joseph Link to the case. Morales and Link were advised that Deputy Chief Ray knew about the investigation and she suggested a warrant check be done on Vincent Ray. Morales and Link ran a warrant check and confirmed Vincent Ray had outstanding warrants. They then left the Vice Control Division and met with the landlord. Morales, Link, and the landlord concocted a

scheme whereby the landlord would call Vincent Ray *and request that he meet him on his property,* ostensibly to settle an ongoing dispute about a security deposit, but with the actual intention of giving Morales and Link an opportunity to arrest him. They planned to execute the scheme the following day. At the end of Link's shift on March 22, 1998, he briefed his supervising lieutenant on everything that had transpired with the investigation and completed a "Matter Of" report detailing the facts of the investigation. The "Matter Of" report mentioned the fact that Vincent Ray had outstanding warrants.

The scheme with the landlord did not go as planned, and Morales and Link spent the next two weeks searching for Vincent Ray. On April 6, 1998, the landlord called Morales and told him he spotted Vincent Ray's vehicle. Morales and Kolatski went to the place where Vincent Ray's vehicle was spotted and waited for an opportunity to make the arrest. After some time, they saw Vincent Ray getting into his vehicle, and they conducted a traffic stop and placed him under arrest. Once the arrest was made, Morales and Kolatski arranged a meeting with Link to discuss Vincent Ray's arrest and subsequent interrogation.

Before heading back to the Vice Control Division, Morales, Kolatski, and Link decided to stop at Gold Rush Chicken to get something to eat. While they were waiting for their food, Morales left to use the bathroom. While Morales was gone, Kolatski began to inform Link about the details of Vincent Ray's arrest.

Kolatski did this because Link was responsible for interrogating Vincent Ray once he returned to the Vice Control Division and needed to know about the arrest. Kolatski told Link he had a bad feeling about the whole investigation and said jokingly, "hey its been nice working with you." (Defendants' Undisputed Proposed Facts ("DUF") ¶ 88.) Kolatski made this joke because he thought there would be some sort of retaliation coming his way for arresting the brother of a deputy chief.

As it turns out, the owner of the chicken restaurant, Mr. Mullarkey, overheard a portion of the discussion between Kolatski and Link and wanted to know what happened and why the two no longer would be working together. He then said something like, "What? Did you throw the Chief in jail?" (DUF ¶ 90.) Kolatski told Mullarkey he did not arrest the Chief. Mullarkey then asked Kolatski how he knew he would be transferred. Kolatski said he didn't know, but that he just had a feeling because he arrested a relative of someone in the MPD. Mullarkey then asked whether he arrested Deputy Chief Ray, and Kolatski said no, just a relative of someone in the MPD. Kolatski never said he arrested Vincent Ray or anyone related to Deputy Chief Ray.

Mullarkey then proceeded to explain he had recently delivered chicken to Deputy Chief Ray's house and that Chief Jones was there and so was an individual who fit Vincent Ray's description. At that point, Link and Kolatski asked Mullarkey to describe the individual, and he described a dark African

American with tattoos – a description that seemed to match Vincent Ray. Mullarkey indicated this delivery had occurred in the last two weeks.

Morales returned from the restroom and the three officers left the chicken restaurant to return to the Vice Control Division. Once they were out of the restaurant, Kolatski told Morales about what Mullarkey had said. The three officers discussed Mullarkey's allegations and concluded if Mullarkey made the delivery in the last two weeks, that would mean Vincent Ray would have been in the same house as Chief Jones and Deputy Chief Ray around the same time the Vice Control Division was trying to arrest Vincent Ray on outstanding warrants. The three also recalled that Deputy Chief Ray knew about Vincent Ray's outstanding warrants, and they also surmised that Chief Jones read Link's "Matter Of" report and therefore also knew about Vincent Ray's outstanding warrants. Thus, the three believed it was possible that Chief Jones and Deputy Chief Ray were harboring Vincent Ray at a time when they knew he was wanted.

While Link was returning to the Vice Control Division, he called ahead and informed Lieutenant Habeck that Vincent Ray was in custody. Habeck then informed Deputy Chief Ray. When Deputy Chief Ray learned her brother was arrested, she made it clear to Habeck that her address was not to appear on Vincent Ray's arrest report. Habeck told Deputy Chief Ray that her brother had told the police his address was 5004 W. Townsend Street. Deputy Chief Ray told

Habeck that was *her* address, and it was not to appear on the arrest report even if it meant listing Vincent Ray's address as a "fucking street pole." (Plaintiffs' Undisputed Facts ("PUF") ¶ 48.)

When Link returned to the Vice Control Division, Habeck told him about Deputy Chief Ray's instructions that her address not appear on the arrest report. Link told Habeck he was required to include any address Vincent Ray gave him on the arrest report and that doing otherwise was criminal. Link told Habeck if he had a problem with that, someone else would need to perform the interrogation. Link then proceeded to interrogate Vincent Ray, but before he could ask him where he was living between March 22, 1998, and April 6, 1998, Vincent Ray stated he did not wish to answer any other questions and the interrogation was terminated. At the conclusion of the interview, Link completed Vincent Ray's arrest report and gave copies to Habeck and Morales.

The next morning (April 7, 1998), Morales took Vincent Ray's arrest report to Assistant District Attorney John Chisholm. Chisholm noticed the pedigree report, a report which identifies the arrestee's family, was missing from Vincent Ray's arrest report. Chisholm asked Morales where the pedigree report was. Morales said he did not know, but thought it might have something to do with the fact that Deputy Chief Ray did not want her address to appear in the arrest report. Morales told Chisholm that Vincent Ray had listed as his home address the same address as Deputy Chief Ray's. He also told

Chisholm the Vice Control Division had information about outstanding warrants for Vincent Ray's arrest. Chisholm wanted to know whether Deputy Chief Ray knew her brother was wanted. Morales then told Chisholm about what Kolatski told him concerning Mullarkey's allegations, and he explained it was possible that Chief Jones and Deputy Chief Ray had knowledge that Vincent Ray was wanted on felony warrants when Mullarkey's food delivery took place.

That same day, Chisholm and another investigator interviewed Mullarkey. Mullarkey told Chisholm someone had already spoken to him about his allegations, but he would not identify that person. Mullarkey also appeared to Chisholm to be extremely uncomfortable and Mullarkey explained he had good relations with the police and did not want to be put in this position. During the course of the interview, Mullarkey told Chisholm the delivery he made to Deputy Chief Ray occurred sometime in January 1998 rather than two weeks ago.

The next day, April 8, 1998, Morales and Link met with Deputy District Attorney Jon Reddin. Link told Reddin he would have to order Morales and him to secrecy or else they would have to tell their MPD superiors about the district attorney's investigation into Mullarkey's allegations. Reddin told them he could not order them to secrecy.

Later that day, Deputy Chief Ray, Link, and Morales had a meeting. Deputy Chief Ray wanted to know what had transpired in the district attorney's

office, and Link told her there was an investigation against her. Link explained her brother had two or three warrants outstanding and the district attorney wanted to know if Vincent Ray was living with her and whether she knew Vincent had these warrants. Link told Deputy Chief Ray about everything that occurred at the district attorney's office concerning Mullarkey's allegations, how the information was received, how the information was given to the district attorney's office, and about the information concerning the completion of the pedigree report. Deputy Chief Ray then asked Morales how this got started in the district attorney's office. Morales explained the pedigree report was missing when he got to the district attorney's office and Chisholm started asking questions. Morales told Deputy Chief Ray he informed Chisholm about her concerns that her name not appear on the pedigree report. Deputy Chief Ray then questioned Morales as to why Chisholm was making a big deal about a missing pedigree report and Morales explained that before they did their paperwork on her brother's arrest, they stopped at Gold Rush Chicken and the owner, Mullarkey, told them he knew Monica Ray personally and delivered chicken to her house and that her brother was there, that his delivery had occurred recently, and all of this information was given to the district attorney's office who now wanted to know when this delivery occurred. Detective Link told Deputy Chief Ray she should also know that Mullarkey said Chief Jones was there. Detective Link observed that Deputy Chief

Ray did not seem surprised about any of the information given.

After this meeting was completed, Deputy Chief Ray called Chief Jones and her attorney because she had concerns about the district attorney mounting an investigation into Mullarkey's allegations. Deputy Chief Ray told Chief Jones what Link and Morales told her. Chief Jones told Deputy Chief Ray the allegations were not true and not to worry about it. Deputy Chief Ray told Chief Jones she had already spoken to her attorney about her concerns, and the attorney advised her he would look into it and get back to her. Chief Jones also retained a personal attorney.

Deputy Chief Ray met with her attorney later that afternoon. During that meeting Chief Jones contacted her and explained he spoke with District Attorney E. Michael McCann who explained there was no investigation being conducted, but that the district attorney's office was looking into Mullarkey's complaint because they were obligated to do so. District Attorney McCann also told Chief Jones he was going to send his deputy district attorneys over to the chief's office to ask some questions and explain what was going on. Chief Jones then invited Deputy Chief Ray and her attorney to his office so everyone would be present for the meeting. Chief Jones was asked by the deputy district attorneys whether he was present at Deputy Chief Ray's home at the time alleged by the chicken restaurant owner, and the Chief indicated that he was not there. Deputy Chief

Ray generally denied the allegations and did not appear to be happy about being interviewed. At the end of the interview, Reddin informed Deputy Chief Ray he had an obligation to check into these very serious allegations, as he took an oath to uphold the law, and if a person knew someone was wanted and prevented their apprehension, they would be aiding or harboring a felon.

Later that day, Chief Jones met with Dale Schunk of the MPD's Internal Affairs Division. Chief Jones explained to Schunk he learned a couple weeks earlier that Vincent Ray was involved in drugs and the Chief wanted it investigated thoroughly. Chief Jones also explained to Schunk that the officers involved in Vincent Ray's arrest went to a chicken restaurant where they discussed the arrest of Vincent Ray and the owner had told them he delivered food to Deputy Chief Ray's home and that her brother answered the door with Chief Jones also being there. Chief Jones told Schunk the Internal Affairs Division would be investigating whether these officers should have been discussing police business in the restaurant but an investigation should not be initiated yet.

On April 14, 1998, Deputy Chief Ray was contacted by a television reporter who informed her that he learned Vincent Ray was being shown Chief Jones' photograph. Deputy Chief Ray telephoned Chief Jones and informed him her brother was being shown his photograph by Reddin, but she could not explain why this was occurring. Chief Jones told her he would call and find out. Deputy Chief Ray was concerned

because she was told the investigation into Mullarkey's allegations was over.

Chief Jones called Reddin and told Reddin he was upset because he heard Reddin was questioning Vincent Ray about his relationship with Deputy Chief Ray. Reddin perceived that Chief Jones was very upset by this. Reddin explained to Chief Jones he was not showing Vincent Ray the Chief's photograph for the reasons the Chief had stated, but for the purpose of determining if Vincent Ray knew Chief Jones and had seen him at Deputy Chief Ray's house during the time Vincent Ray was wanted. Chief Jones was mad at Reddin and explained he was upset that the district attorney's office had made further inquiries into this matter. Later that day, the district attorney's office completed its investigation into allegations made by Mullarkey and concluded there was no prosecutable merit.

On April 15, 1998, Chief Jones instructed Deputy Inspector Schunk to proceed with an Internal Affairs Division investigation into the statements by the officers at the chicken restaurant because Chief Jones felt specific questions needed to be addressed by Mullarkey. As Schunk understood his instructions, the Internal Affairs investigation was to focus on the failure of the officers to keep confidential police official business of the department. Schunk understood that by conducting this investigation, he was going to try to get facts on what was said, by whom it was said, and to determine if any rules were violated. On April 17, 1998, Schunk, together with Captain

Thompson of the Internal Affairs Division, interviewed Mullarkey. After completing his interview of Mullarkey, Schunk briefed Chief Jones on the interview.

On April 17, 1998, Kolatski was transferred from the Vice Control Division to patrol duties for the early shift in district 1. At the time of his transfer, he had been in the Vice Control Division for approximately 18 months. Chief Jones approved the transfer order. Kolatski was never given a reason for his transfer. Chief Jones stated he approved the transfer order, but he did not know the reason for the transfer. Deputy Chief Ray testified she recommended Chief Jones transfer Kolatski from the Vice Control Division for two reasons. First, the division was in the midst of a transition of moving people out, and Kolatski had been in the unit for awhile. Second, she was told Kolatski was responsible on more than one occasion for disturbing some items on her administrative assistant's desk, even though he and other officers had been specifically instructed to stay away from that area, and her administrative assistant was so upset about this that she had threatened to leave the unit. Deputy Chief Ray's captains and lieutenants were surprised to learn Kolatski was transferred and did not understand it. They did not believe his run-in with Deputy Chief Ray's administrative assistant warranted a transfer from the Vice Control Division.

On January 22, 1999, Morales was transferred from the Vice Control Division to District No. 6 nights, and he was treated like a new recruit. At the

time he was transferred, he was playing a major role in the narcotics investigation into the Lopez family which was one of the largest cases being handled by the Vice Control Division. The Lopez crime family was identified as one of the largest, best organized violent crime organizations in the City of Milwaukee. Numerous attempts were made to penetrate the Lopez family crime organization without success until an informant agreed to cooperate with Morales with the understanding he would be working with Morales based on a level of trust developed with Morales. On January 19, 1999, Assistant District Attorney Chisholm entered into a formal agreement with the informant who was planning to be used to penetrate the Lopez crime family under the condition that he agreed to cooperate with Morales in this investigation and to act under the direction and control of Morales. During the time Morales was working with the district attorney's office on the Lopez investigation, Morales was considered the lead officer. Two days later, Morales informed Chisholm that he had been transferred from the Vice Control Division to night shift patrol duty and could not participate in the Lopez investigation or work with the informant as was previously planned. Chisholm had never seen the lead officer on a significant investigation being taken off of the case prior to its completion. Morales was never given a reason for his transfer.

Chief Jones stated he had no personal knowledge as to why Morales was transferred, even though he approved the transfer order. Deputy Chief Ray testified

she recommended Morales' transfer for two reasons. First, she testified he was transferred as part of the restructuring of the Vice Control Division. Second, she testified he was transferred at that time because he was on a promotional list for detective and needed to become re-acclimated with crime scenes. Deputy Chief Ray knew of the narcotics investigation into the Lopez family. Prior to this, no police officer assigned to the Vice Control Division had ever been transferred to district patrol duty while waiting to be promoted to a position of detective. Deputy Chief Ray's captains and lieutenants were surprised by Morales' transfer and did not understand it.

JURISDICTION, VENUE AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper in the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1391(b). The district court may grant summary judgment "if the pleadings, deposition, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The mere existence of a factual dispute does not defeat a summary judgment motion; rather, the requirement is that there be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine when the evidence is such that a

"reasonable jury could return a verdict for the non-moving party." *Id.* A party opposing a summary judgment motion "may not rest upon mere allegations or denials," but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In evaluating a motion for summary judgment, a court is " . . . not required to draw every conceivable inference from the record – only those that are reasonable." *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991).

DISCUSSION

Kolatski and Morales claim the defendants retaliated against them in violation of the First and Fourteenth Amendments by transferring them from the Vice Control Division for making statements concerning Vincent Ray's arrest and Mullarkey's allegations. The First and Fourteenth Amendments prohibit a municipality from punishing an employee for speaking out on a matter of public concern, *see Connick v. Myers*, 461 U.S. 138, 142 (1983); *Linhart v. Glatfelter*, 771 F.2d 1004, 1009 (7th Cir. 1985), so long as the municipality's interest in efficient operation does not outweigh the importance of the right to speak in the individual's case. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

To survive summary judgment on their claims, Kolatski and Morales must set forth evidence sufficient to show three things: (1) they engaged in speech

that was a matter of public concern; (2) they suffered an adverse employment action; and (3) their speech played at least a substantial part in the employer's decision to take the adverse employment action. *See Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002). If the plaintiff sets forth evidence to show these three things, the burden shifts to the defendant to show either the government's interest, as an employer, in efficiently providing government services outweighs the employee's First Amendment interests or it would have taken the same adverse employment action even if the plaintiff had not engaged in the protected speech. *Gustafson*, 290 F.3d at 906.

Setting aside for the moment the question of whether Kolatski and Morales set forth evidence sufficient to satisfy the first element, the court concludes there is sufficient evidence in the record to establish a *prima facie* case for the second and third elements. The court's review of the record, in its entirety, leads to the inescapable conclusion that there are genuine issues of fact for these two elements which preclude summary judgment. Also, the defendants do not attempt to show the government's interest in efficiently providing government services outweighs the plaintiffs' First Amendment interests or that it would have taken the same adverse employment action against them even if they had not engaged in protected speech; as such, whether the defendants are entitled to summary judgment hinges entirely upon whether the plaintiffs can set forth evidence to satisfy the first element.

The first element requires the plaintiffs to show their speech was a matter of public concern. At its core, the "public concern" element focuses on whether the plaintiffs' speech can be fairly characterized as relating to "a matter of political, social, or other concern to the community, rather than a merely personal grievance of interest only to the employee." *Gustafson*, 290 F.3d at 907 (citing *Connick*, 461 U.S. at 146). Whether a government employee's speech is protected by the First Amendment is a question of law for the district court to decide. *Gustafson*, 290 F.3d at 906. The court makes this determination by looking at the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Of the three, the "content" of the speech is the most important factor. *Delgado v. Jones*, 282 F.3d 511, 517 (7th Cir. 2002).

For purposes of summary judgment, the defendants concede Morales can show he engaged in protected speech; thus, the court must only determine whether Kolatski can show the same. Kolatski argues there are three instances where he engaged in protected speech: (1) his statements to Link at Gold Rush Chicken about the details of Vincent Ray's arrest; (2) his verbal exchange with Mullarkey; and (3) his disclosure about Mullarkey's statements to Morales. After considering the record in its entirety, the court concludes Kolatski's statements to Link and Morales, but not his statements to Mullarkey, were matters of public concern.

The court first considers whether Kolatski's statements were of public concern in their "content." The Seventh Circuit has stated that "a communication by a law enforcement officer that contains information essential to a complete and objective investigation of serious criminal activity is 'content' that implicates public concern." *Delgado*, 282 F.3d at 517-18. Here, Kolatski's statements to Link constituted communications essential to a complete and objective investigation of Vincent Ray's criminal activity. After all, Link had to interview Vincent Ray when he returned to the Vice Control Division, and he needed to know about Vincent Ray's arrest to conduct an effective interview. In addition, Kolatski's statements to Morales constituted communications essential to a complete and objective investigation into the possible criminal activity of Chief Jones and Deputy Chief Ray. After all, Morales was one of the lead officers in the Vincent Ray investigation, and he needed to be apprised of Mullarkey's allegations so he could look into them. However, from the record the court is unable to conclude that Kolatski's verbal exchange with Mullarkey falls within this category. Kolatski's comments to Mullarkey were vague, noncommittal, and even evasive, and they were of no apparent interest to anyone. The fact that Mullarkey followed up this uneventful verbal exchange with curious details concerning the conduct of Chief Jones and Deputy Chief Ray does not change the analysis. As such, the court concludes only Kolatski's statements to Link and Morales were about matters of public concern in their content.

The defendants argue Kolatski's statements to Link and Morales were nothing more than "chit-chat" similar to the statements considered by the Seventh Circuit in *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990). The court cannot agree. In *Swank*, the Seventh Circuit found a conversation between a police officer and a teen-age girl that occurred during a joy-ride on the officer's motorcycle was not a matter of public concern. *Id.* at 1249. During the joy-ride, the two discussed the girl's former boyfriend, her opinion of a college she was planning to attend, and related topics. *Id.* at 1250. The Seventh Circuit concluded that although this "chit-chat" may have been important to the participants, it was not important to the community at large and too remote from "familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment." *Id.* at 1252. Kolatski's statements to Link and Morales were nothing like the officer's speech in *Swank*. Kolatski's statements to Link and Morales concerned serious police business that concerned the upcoming interview of a man in custody and allegations that potentially implicated the MPD Chief and Deputy Chief in criminal activity – matters that are deeply important to the community at large. Accordingly, the court simply cannot agree that Kolatski's statements were nothing more than vapid chit-chat.

The court next considers whether Kolatski's statements were of public concern in their "form" and "context." Whether speech is a matter of public concern in its form and context essentially boils down to

whether the public employee was motivated to make the statement out of an apparent concern for the public interest. *Linhart*, 771 F.2d at 1010. In other words, the court must look at the public employee's *point* for making the statement:

> [We must] look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern. Or was the point to further some purely private interest?

Id.

In *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002), the Seventh Circuit explained an employee's statement cannot be motivated by an apparent concern for the public interest unless it is the product of some independent discretion or judgment. The plaintiff in that case, Octavio Delgado, was a Milwaukee police officer who had information about criminal activity that potentially involved an immediate relative of an elected official, who also happened to be a close personal friend of the MPD Chief Arthur Jones. *Id.* at 519. Delgado divulged this information to his superior officer and summarized the information in a "Matter Of" report which worked its way up the chain of command and ultimately reached Chief Jones. *Id.* at 514. Delgado was transferred from his current position in the police department to a less desirable position soon after Chief Jones learned of the "Matter Of" report, and Delgado subsequently filed a lawsuit

alleging he was retaliated against for exercising his First Amendment right to free speech. *Id.*

The defendants in *Delgado* argued his conversations with his superior officer and the "Matter Of" report did not constitute speech on a matter of public concern because Delgado was simply performing his regular duties as a police officer by divulging this information. *Id.* at 518. The Seventh Circuit rejected this argument and stated that although Delgado was acting consistently with his obligations as a police officer when he divulged this information, it was nonetheless a "product of some independent discretion or judgment" because he had "considerable discretion about *how* he communicated the information up the chain of command." *Id.* at 519 (emphasis added). The Seventh Circuit explained an employee's speech is not a matter of public concern when it is nothing more than "some rote, routine discharge of an assigned duty," such as was the case in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), but the court reasoned Delgado's disclosure to his supervisor and his actions in preparing the "Matter Of" report when "far beyond some rote, routine discharge of an assigned duty." *Id.* The court emphasized an employee's speech is the product of a rote, routine discharge of an assigned duty only in those situations where the employee is acting *entirely* in an employment capacity and is performing a routine task in which he could be fired for failing to perform. *Id.* (citing *Gonzalez*, 239 F.3d at 941, 942).

In *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), the Seventh Circuit explained an employee's statement cannot be motivated by an apparent concern for the public interest unless it was calculated to further some public, rather than private, interest. *Id.* at 1010. The plaintiff in that case, Linhart, was the acting chief of police for the Village of Clarendon Hills in Illinois. *Id.* at 1006. Linhart was hoping to be hired as the actual chief of police, and he had a secret meeting with another hopeful for the position and suggested that person seek a position as President of the Village Board instead. *Id.* The fact that the meeting was held got out and Linhart was subsequently reprimanded. *Id.* He then filed a lawsuit alleging the Village retaliated against him for exercising his right to free speech. *Id.* at 1007. The Seventh Circuit held that Linhart's speech during this private meeting was not a matter of public concern because "it was not his *intention* to speak out on a matter of public concern." *Id.* at 1010 (emphasis added). The court reasoned that Linhart's remarks were "of only personal interest" and that he did not make them with the intention of bringing them to the attention of the public. *Id.*

The twin requirements that an employee's statements be the product of independent judgment and calculated to further some public interest in order to constitute speech on matters of public concern in their "form" and "context" reflects a "categorical judgment" in favor of public agencies by preventing virtually every remark which transpires within a

government office from giving rise to a constitutional case. *Delgado*, 282 F.3d at 519 (citing *Connick*, 461 U.S. at 149). It stands to reason that "a public agency cannot efficiently carry out its functions if the faithful discharge of every *routine* task or *personally* motivated comment could become grounds for challenging virtually any personnel decision. *Id.* At the same time, it is not desirable to have "a *per se* rule exempting statements made in the course of official duties from the protection of the First Amendment." *Delgado*, 282 F.3d at 519. After all, if such a *per se* rule existed, "[e]ffective police work would be hopelessly compromised [because] police officers could [then] be retaliated against for communicating factual details (e.g., a supervisor's relationship to a criminal suspect) that bear on the department's ability to conduct an objective investigation." *Id.*

Here, the court is obliged to conclude Kolatski's statements to Link and Morales were matters of public concern in their "form" and "context." When the court reviews the record in its entirety, it cannot accept the defendants' argument that Kolatski's statements to Link and Morales were the product of a rote, routine discharge of assigned duties. There is nothing in the record to remotely suggest Kolatski had a mandatory, robotic obligation to make these statements to Link and Morales. Rather, the evidence in the record indicates Kolatski, like the officer in *Delgado*, had considerable discretion concerning how and to whom he passed along information concerning Vincent Ray's arrest and Mullarkey's allegations. It

may be that Kolatski had a duty to pass along this information at some point to *someone* in the police department, but the critical issue is not whether his conduct was *consistent* with these obligations; the question is whether he had *discretion* in how he fulfilled those obligations, and whether he exercised that discretion. *See Delgado*, 282 F.3d at 519 ("fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen" does not change the analysis). *Id.* at 519. The court concludes Kolatski had that sort of discretion, and it further concludes that he exercised it.

The court is also obliged to conclude Kolatski's statements to Link and Morales were calculated to further some public, rather than private, interest. Kolatski told Link about Vincent Ray's arrest so he could effectively question Ray when he returned to the Vice Control Division. Thus, his statements were calculated to further the Vincent Ray investigation, which is in the public's interest. Kolatski told Morales about Mullarkey's allegations so Morales and others would be able to look into whether Chief Jones and Deputy Chief Ray did anything unlawful. Thus, his statements were calculated to further an investigation into the truth of Mullarkey's allegations, which is also in the public's interest. *See Delgado*, 282 F.3d at 519 (there is the suggestion of public motivation when the information that is passed on is relevant to the manner and scope of a subsequent police investigation).

Moreover, it is plain to the court that Kolatski did think he was furthering some personal interest when he passed along this information to Link and Morales. Kolatski felt like he was already in trouble by being involved in Vincent Ray's arrest; he could not have thought good things would redound to him after he passed along allegations that potentially implicated Chief Jones and Deputy Chief Ray in criminal activity. *See Delgado*, 282 F.3d at 519 (recognizing "it was hardly in [an officer's] personal interest to antagonize" superiors in the police department). In sum, the court concludes Kolatski's statements to Link and Morales were matters of public concern, and they were therefore protected under the First and Fourteenth Amendments.

The defendants argue even if Kolatski's statements were matters of public concern, the defendants are nonetheless entitled to qualified immunity. A qualified immunity analysis requires the court to determine whether the law was "dearly established" at the time of the alleged violation. *Delgado*, 282 F.3d at 511. The defendants' argument is quickly dispatched. "It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position." *Gustafson*, 117 F.3d at 1021 (citing cases). "It has also been dear for years that speech about police protection and public safety raises matters of public concern." *Id.* It should have been clear to the

defendants that Kolatski's statements were matters of public concern, and accordingly, it was not reasonable for the defendants to believe it was permissible to retaliate against him for making those statements. As such, the court concludes the defendants are not entitled to qualified immunity.

Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment (Docket # 41) be and the same is hereby **DENIED**.

Dated at Milwaukee, Wisconsin, this 29th day of March 2004.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

UNITED STATES DISTRICT
EASTERN DISTRICT OF WISCONSIN

ALFONSO MORALES, and
DAVID KOLATSKI,

Plaintiffs,

v.

Case No. 00-C-618

POLICE CHIEF ARTHUR JONES, DEPUTY CHIEF MONICA RAY, and CITY OF MILWAUKEE,

(Filed Sep. 7, 2001)

Defendants.

ORDER

Plaintiffs are Milwaukee police officers who allege that they were transferred to less desirable assignments in retaliation for providing the Milwaukee District Attorney's office with information about the defendants' potential misconduct. Defendants have made a motion on the pleadings to dismiss the case under Fed. R. Civ. P. 12(c). For the reasons outlined below, the court will deny defendants' motion.

BACKGROUND

The plaintiffs allege that on March 22, 1998, an unnamed landlord called the Milwaukee Police Department Vice Control Division complaining that a tenant, Vincent Ray, was engaged in drug dealing from his apartment. According to the plaintiffs,

Lieutenant Ed Leibrecht discussed the landlord's call with Deputy

Chief Ray, who confirmed that the tenant was her brother Vincent and that he might be wanted on open warrants. Leibrecht assigned the investigation to plaintiff Alfonso Morales and Detective Joseph Link. Leibrecht informed Morales and Link that the suspect was Deputy Chief Ray's brother, and that he might be wanted on open warrants. Morales and Link confirmed that Vincent Ray was wanted on open felon warrants and informed Leibrecht. Later that same day, Morales and Link were told to file a "matter of" report to their captain detailing the extent of their investigation of Vincent Ray. Link completed the report which included information about the warrants, as well as Link's and Morales's intent to attend a meeting between Vincent Ray and the landlord scheduled for March 23, 1998.

On March 23, 1998, Link and Morales allegedly spoke to the landlord and learned that Ray had failed to attend the planned meeting. On April 6, 1998, Morales and plaintiff David Kolatski (Morales's assigned partner for the day) located and arrested Vincent Ray on the open warrant. Morales and Kolatski then met with Link at a local restaurant and briefed him on Vincent Ray's arrest. According to the complaint, Kolatski learned from the owner of the restaurant that the owner had made a delivery to Deputy Chief Ray's home and had seen a man meeting Vincent Ray's description in the same room with Deputy Chief Ray and Chief Jones. According to the

complaint, the owner likely made the delivery after March 22, 1998.

The complaint alleges that Deputy Chief Ray ordered that her name not be included on Vincent Ray's "pedigree report." Link, in consultation with a Lt. Habeck, felt this was inappropriate, and included Deputy Chief Ray on the report, but did not include her official title. The complaint further alleges that the pedigree report, along with other documents were left on Morales's desk at 4:00 a.m. on April 7, 1998 for delivery to the District Attorney's (D.A.) office. At 10:00 a.m. Morales delivered the documents to the DA, who discovered that the pedigree report was missing.

The D.A. questioned Morales about the pedigree report. Morales informed the DA that Deputy Chief Ray had ordered that her name and address not be included in the report. Morales also told the D.A. about the restaurant owner's allegations of seeing Vincent Ray with Deputy Chief Ray and Chief Jones after they would have known about the open warrants on Vincent Ray.

On April 8, 1998, Link and Morales met with the DA. The DA informed them that he was contemplating interviewing Deputy Chief Ray and Chief Jones concerning the pedigree report and the possible meeting with Vincent Ray. According to the complaint, after the meeting, Link reported the DA's plans to his superior, who relayed the information to Deputy Chief Ray. Morales and Link were then

ordered to Deputy Chief Ray's office where they told Deputy Chief Ray everything that had happened at the D.A.'s office.

The complaint alleges that the D.A.'s office conducted a criminal investigation of Deputy Chief Ray by interviewing her and Chief Jones on April 8, 1998. On April 17, 1998, Kolatski was transferred by Chief Jones from the Vice Control Unit to night shift district patrol duty. The complaint further alleges that Link, Morales, and Kolatski were the subject of an internal affairs investigation concerning the information provided to the D.A.'s office. However, no internal rules violations charges were issued against any of them.

On December 8, 1998, Morales was subpoenaed to testify in federal court concerning his involvement in the arrest of Vincent Ray. *See Kuchenreuther v. City of Milwaukee,* Case No. 97-C-1320. On January 22, 1999, Morales was transferred by Chief Jones from the Vice Control Unit to night shift patrol duty. At the time of his transfer, Morales was the lead officer in the largest drug trafficking investigation being conducted by the Milwaukee Police Department.

DISCUSSION

I. Legal Standard

The court will grant a Rule 12(c) motion only if "it appears beyond doubt that the plaintiff cannot

prove any facts that would support his claim for relief." *Craigs, Inc. v. General Elec. Capital Corp.,* 12 F.3d 686, 688 (7th Cir.1993) (quoting *Thomason v. Nachtrieb,* 888 F.2d 1202, 1204 (7th Cir.1989)). In order to prevail, the moving party must demonstrate that there are no material issues of fact to be resolved. The court "will view the facts in the complaint in the light most favorable to the nonmoving party." *GATX Leasing Corp. v. National Union Fire Ins.* Co., 64 F.3d 1112, 1114 (7th Cir.1995). However, the court is not "obliged to ignore any facts set forth in the complaint that undermine the plaintiffs claim or to assign any weight to unsupported conclusions of law." *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.,* 895 F.2d 279, 281 (7th Cir.1989).

II. First Amendment Retaliation

To state a First Amendment retaliation claim, the facts in the complaint must demonstrate that: (1) the plaintiffs engaged in constitutionally protected speech; and (2) the defendants retaliated against the plaintiffs because of their speech. *See Gustafson v. Jones,* 117 F.3d 1015, 1018 (7th Cir. 1997) (citations omitted). "When a public employee alleges that she has suffered retaliation for the exercise of her First Amendment rights, she should be required to allege facts that could support a finding that the speech is on a matter of public concern." *Id.* The defendants argue that the plaintiffs' speech was not on a matter of public concern. In a supplemental filing, the defendants have directed the court to the Seventh Circuit's

recent decision in *Gonzalez v. City of Chicago,* 239 F.3d 939 (7th Cir. 2001) to support a finding that the plaintiffs' speech was not on a matter of public concern. In *Gonzalez,* the plaintiff alleged that his termination as a police officer was in retaliation for exercising his First Amendment right to free speech during his previous employment as a civilian employee of the police department's office of professional standards. *See id.* The Seventh Circuit held that the plaintiff's speech in his prior position had not been on a matter of public concern because "he was dearly acting entirely in an employment capacity." *Id.* at 941.

According to the defendants, the plaintiffs' speech in this case is similar to that in *Gonzalez*; the speech was merely part of their job as police officers and therefore not protected. The court disagrees. The *Gonzalez* court went on to state: "If Gonzalez were writing reports of police misconduct, and his supervisors told him to rewrite the reports so as not to disclose police corruption, Gonzalez would have a First Amendment right to expose the police cover-up to the public." *Id.* That is the case here. The plaintiffs have alleged that they were ordered to leave Deputy Chief Ray's name off the pedigree report. *See* Compl. at ¶ 17. They have also alleged that Chief Jones and Deputy Chief Ray may have been seen with Vincent Ray after the former knew he was wanted on outstanding warrants. *See id.* at ¶ 15. Given these allegations, the plaintiffs have established a claim that

their speech was on a matter of public concern, i.e. a police cover-up.

The facts of the complaint also show that the defendants retaliated against the plaintiffs because of their speech. According to the complaint, Kolatski was transferred from vice to night shift patrol less than two weeks after the D.A.'s investigation into the matter. *See* Compl. at ¶ 26. In addition, Morales alleges that he was transferred to a much less desirable position as a result of his communications with the D.A. *See id.* at ¶ 31. The court finds these allegations sufficient to state a claim for First Amendment retaliation against the defendants.

III. Qualified Immunity

Public officials performing discretionary functions are entitled to qualified immunity from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Erwin v. Daley,* 92 F.3d 521, 525 (7th Cir. 1996). It is an objective test, the question being whether a reasonable official would have understood that what she was doing was unlawful. *See Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *Kerr v. Farrey,* 95 F.3d 472, 480 (7th Cir. 1996).

"It has been well established for many years in this Circuit that a public employer may not retaliate

against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position." *Gustafson,* 117 F.3d at 1021 (citations omitted). The *Gustafson* court further noted that "speech about police protection and public safety raises matters of public concern." *Id.* (citing *Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir. 1990); *Glass v. Dachel,* 2 F.3d 733, 741 (7th Cir. 1993). In this case, the pleadings show that the speech was on a matter of public concern. The pleadings also adequately allege that the decision to transfer the two officers was retaliatory in nature. Under these circumstances, it would be premature to find qualified immunity for the defendants.

Despite the foregoing discussion, the court's protective order of October 27, 2000, will remain in force until thirty (30) days after the Seventh Circuit court of appeals enters judgment in the consolidated case *Gustafson v. Jones,* Case No.(s) 00-3557 and 00-4020. That case involves the same defendants and many of the same issues as the present case. If the Seventh Circuit rules there that the defendants do, in fact, enjoy qualified immunity, that finding would likely become applicable to this case, and any discovery already completed would go for naught. In order to promote economy, then, and to prevent interference with another related case, *Gustafson v. Jones,* Case

No. 00-C-1397 (E.D. Wis.),[1] the court feels the protective order must remain in place for a brief additional period.

Accordingly,

IT IS ORDERED that the defendants motion for judgment on the pleadings be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that the court's October 27, 2000 protective order remain in force until thirty (30) days after the Seventh Circuit Court of Appeals enters judgment in the consolidated case *Gustafson v. Jones,* Case No.(s) 00-3557 and 00-4020.

Dated at Milwaukee, Wisconsin this 7th day of September, 2001.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmueller
Chief Judge

[1] The court has denied discovery in *Gustafson v. Jones* until the issuance of a decision in the Court of Appeals' case to allow the defendants to file a motion for judgment on the pleadings should the higher court rule in their favor.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 17, 2007

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Joel M. Flaum, *Circuit Judge*

Hon. Ilana Diamond Rovner, *Circuit Judge*

No. 06-1463

ALFONSO MORALES and DAVID KOLATSKI,

Plaintiffs-Appellees,

v.

ARTHUR JONES, MONICA RAY, and CITY OF MILWAUKEE,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 00 C 618

David R. Herndon, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by plaintiffs-appellees in the above case on July 31, 2007, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition. The petition for rehearing is therefore DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 17, 2007

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Joel M. Flaum, *Circuit Judge*

Hon. Ilana Diamond Rovner, *Circuit Judge*

No. 06-1463

ALFONSO MORALES and DAVID KOLATSKI,

Plaintiffs-Appellees,

v.

ARTHUR JONES, MONICA RAY, Deputy Chief, and CITY OF MILWAUKEE,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 00 C 618

David R. Herndon, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by defendants-appellants in the above case on July 31, 2007, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition. The petition for rehearing is therefore DENIED.

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(2)

No. 07-556

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

ALFONSO MORALES and
DAVID KOLATSKI,

Petitioners,

v.

ARTHUR JONES, MONICA RAY
and CITY OF MILWAUKEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE LOWER COURTS ARE APPLYING THE "OFFICIAL DUTIES" TEST SET OUT IN *GARCETTI* TOO BROADLY

Lieutenant Morales and Detective Kolatski have failed to demonstrate that the lower courts have misunderstood and misapplied the "official duties" test so that public employee speech which should be protected under the First Amendment is not. In support of their petition, they have really argued only that the seventh circuit incorrectly decided the question in this appeal. They have not cited to nor argued about any court reaching any different conclusion about the application of the "official duties" test in a factually-similar context. Just as significantly, they have not even shown that the seventh circuit misunderstood or misapplied the test in concluding that most of their speech is not entitled to protection by the First Amendment.

In *Garcetti v. Ceballos*, ___ U.S. ___, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689 (2006), this Court established that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." While not in that case having the occasion to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for

serious debate," this Court did explain that mere job descriptions should not govern the determination, that the question "is a practical one," and that the lower courts must determine those "duties an employee actually is expected to perform." *Id.*, 126 S.Ct. at 1961-2.

The only case other than their own to which Morales and Kolatski make reference is *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). That case does not, however, represent an application of the "official duties" test that conflicts, or is even inconsistent with the analysis or conclusion reached by the seventh circuit in this case. It in fact represents merely a consistent application of the test but under a very different set of factual circumstances that account for the opposite conclusion about First Amendment protection for the employee's speech.

In *Freitag*, the ninth circuit addressed a First Amendment claim by a female prison guard who had "sent a letter to California State Senator Richard Polanco in which she alleged that she and other female correctional officers were regularly subjected to sexually abusive behavior in the SHU [Secure Housing Unit] and that supervisors failed to respond adequately to her complaints regarding inmate conduct" . . . [and also asserted] that her disciplinary reports either were ignored completely or were not acted upon in sufficient time to permit the disciplining of inmates." *Id.*, 468 F.3d at 534. She wrote a second letter to the state senator describing other mistreatment she had suffered at the hands of staff

and inmates. *Id.* She also cooperated and communicated with the state's inspector general's office in an investigation of these matters prompted by her correspondence with the state senator. *Id.*

Upon those particular facts, the ninth circuit correctly concluded that with respect to Freitag's communications with the state senator and the inspector general's office, she did not speak as a part of her official duties. *Id.*, 468 F.3d at 545. "It was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace." *Id.*

Making a "practical" inquiry here, as directed by this Court in *Garcetti*, among the duties a state prison guard is not "expected to perform" is a complaint to elected state officials and communication with outside investigators about sexual harassment and improper supervision in the prison. *Garcetti*, 126 S.Ct. at 1961, 1962. As a practical matter, a guard is hired to guard the prisoners, and not manage prisons. Recounting unheeded complaints about inmate harassment, however, is not a part of those duties which the public would expect prison guards to perform, much less expect them to have to perform. This is the stuff of citizen's complaint to his or her elected officials.

By contrast, in recounting the events of the arrest to Detective Link, and later disclosing Mullarkey's

fantastic (and later disproven) allegations against Chief Jones and Deputy Chief Ray to Morales, Kolatski was engaged in one of his official tasks. The same is equally true for Morales when he repeated Mullarkey's allegations as well as various other incidents in the course of the investigation to the prosecutor as a part of the offered explanation for the absence of the "pedigree report." Parenthetically, the same would be true for Kolatski's initial conversations involving Mullarkey about which the petitioners erroneously make argument in their petition. As reflected in an earlier decision by the district court, it concluded upon the defendants' summary judgment motion "that Kolatski's verbal exchange with Mullarkey" did not fall within the category of speech about a matter of public concern and was unprotected. Petitioners' Appendix, p. 83. Kolatski did not appeal that decision and therefore has waived any argument that this particular speech should be afforded any First Amendment protection.

As to Kolatski's statements to Link about Vincent Ray's arrest and Kolatski's subsequent recounting to Morales of Mullarkey's claims, as even the district court described it before this Court had decided *Garcetti*, these were "communications essential to a complete and objective investigation of Vincent Ray's arrest" and "essential to a complete and objective investigation in the possible criminal activity of Chief Jones and Deputy Chief Ray." Petitioners' Appendix, p. 83. Engaging in a "practical" inquiry here, as directed by this Court in *Garcetti*, among the duties a

police officer "is expected to perform" is the complete and objective investigation of criminal activity, either in a particular case to which they have been assigned (here, Vincent Ray's arrest) or in a significant matter demanding attention and police action (here, allegations against the chief and deputy chief). *Garcetti*, 126 S.Ct. at 1961, 1962.

Though in testimony from the officers and chief it was made clear that a mere police officer would not be in a position to "act upon" allegations against the chief and deputy chief, that does nothing to establish that the public would expect a police officer to simply ignore such claims. Wisconsin law in fact prescribes that an officer "may arrest a person" when, among other things, the officer has "reasonable grounds to believe that *the person* is committing or has committed a crime." Wis. Stats. § 968.07(1)(d). There was no testimony or other evidence, furthermore, that any rule of the Milwaukee Police Department actually prohibits a mere police officer from "acting upon" either reported or observed criminal misconduct by a superior. Surely the public would expect Kolatski or Morales to arrest or even use force against any superior who might psychotically execute a citizen. Surely the public would have expected Morales or Kolatski to have stopped their captain or lieutenant if they had observed one of those superiors driving drunk on duty while they were driving with Detective Link from Mullarkey's establishment.

The public might expect these officers not to handle Mullarkey's allegations alone. Such action in

and of itself might lessen the proper exercise of authority in the chain of command of a quasi-military organization like a police department. Furthermore, there would be concerns that a subordinate would be too conflicted in his or her interests in conducting an investigation of a high-ranking superior officer.

That, however, does not equal a conclusion that a police officer, charged generally with enforcing the laws of his or her state and municipality, does or should take no official action with respect to a superior, even a high ranking one, in reporting alleged criminal conduct by the official. The practical answer to this question is that the public would expect the officer to act properly upon a serious allegation and must investigate or ask others properly situated to investigate such a claim. That is what both Kolatski and Morales ultimately did here.

The argument by Kolatski and Morales that the seventh circuit's reference to the police department's rule mandating officers "to report all potential crimes" erroneously makes a job description into the acid test of whether some action is part of the officers' "official duties." *Morales v. Jones*, 494 F.3d 590, 598, 600 (7th Cir. 2007) (Petitioners' Appendix, pp. 15, 21). Their argument misses the mark for this Court was concerned in *Garcetti* that "employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 126 S.Ct. at 1961. That problem does not exist here. The people of Milwaukee would expect their police department to direct its officers to obey a rule like this; they would not want a

department to direct officers that they are to ignore crimes. By the same token, and admittedly using an extreme example, they would not expect police officers to be directed by employer policy to collect all local trash and to file reports about such activities. The appellate court below neither relied upon this rule exclusively to determine that the officers made these statements as part of their "official duties" nor did it rely upon a policy that constituted an overreaching attempt by a municipal employer to deprive its employees of legitimate First Amendment protection. Police officers legitimately should be directed to report crimes and the public would expect if not demand this.

Kolatski recounted the events of Vincent Ray's arrest to Link and there can be no doubt that such speech was a part of his official duties. Kolatski later recounted Mullarkey's allegations to Morales who had been assigned the Vincent Ray investigation and who was going to take the paperwork relating to his arrest to the prosecutor. "Kolatski had a duty to apprise Morales of any information pertinent to the investigation [of Vincent Ray]." *Morales*, 494 F.3d at 597 (Petitioners' Appendix, p. 14).

As reflected in the arrest report, the officers arrested Vincent Ray in part on a charge of "bail jumping." R.125:6, p. 1 (Ex. 6, Arrest Report Relating to Vincent Ray, p. 1). The Wisconsin Statute cited in the arrest report, that is, Wis. Stat. § 946.49, makes it a crime for a person who "*intentionally* fails to comply with the terms of his or her bond. . . ." Wis. Stat. § 946.49(1) (emphasis supplied). The element of

intent in the statute requires a showing that a criminal defendant knew the terms of his or her bond and knew that his or her actions did not comply with those terms. *State v. Taylor*, 226 Wis. 2d 490, 502, 595 N.W.2d 56 (Wis. App. 1999), *rev. den.*, 228 Wis. 2d 174, 602 N.W.2d 760 (1999). Not that the statement that Link took from Vincent Ray contained any mention of it, but it would have been important, if possible, for these officers to explore whether Vincent Ray would state that he had been in his sister's presence or, for that matter, in the presence of Chief Jones, and that one or both of them had informed him of open warrants, and, perhaps, that they had told him that such matters "would be taken care of" without him having to formally and voluntarily turn himself in to police authorities. R.125:6, pp. 4-5 (Ex. 6, pp. 4-5 of Arrest Report containing Vincent Ray's statement). Kolatski's recounting of Mullarkey's allegations thus contained information that was pertinent to the investigation of Vincent Ray as well as pertinent to any investigation of the chief or deputy chief.

For these same reasons and one more, Morales' statements to the prosecutor about Mullarkey's allegations and the course of the Vincent Ray investigation were similarly pertinent to both the Vincent Ray investigation and any other investigation of the chief or deputy chief. The prosecutor would certainly want to know about any contact between Vincent Ray and his sister or deputy chief while police looked for him on the warrants. Furthermore, this information

was pertinent to the missing report and accounting for it to any criminal defense attorney who may appear on Vincent Ray's behalf. *Morales*, 494 F.3d at 597 (Petitioners' Appendix, p. 15). Lastly, but perhaps most significantly, as a practical matter, the public would expect Morales as part of his duties as a police officer to inform proper authorities such as the county's prosecutor of serious allegations of criminal conduct lodged against any law enforcement officer, whether a superior or not.

The dissimilar facts of *Freitag* and this case account for the conclusion that the ninth and seventh circuits have consistently and properly applied the "official duties" test of *Garcetti* to reach opposite yet correct conclusions about the application of the First Amendment to speech at issue in the two cases. Kolatski and Morales have also failed to demonstrate that the seventh circuit misunderstood the test and applied it too broadly here or that it or other courts have done so in any other case. In fact, a review of the opinion below reveals that the seventh circuit correctly analyzed and applied the test to these instances of their speech to conclude that these statements were a part of their "official duties."

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari filed by David Kolatski and Alfonso Morales.

Respectfully submitted,

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